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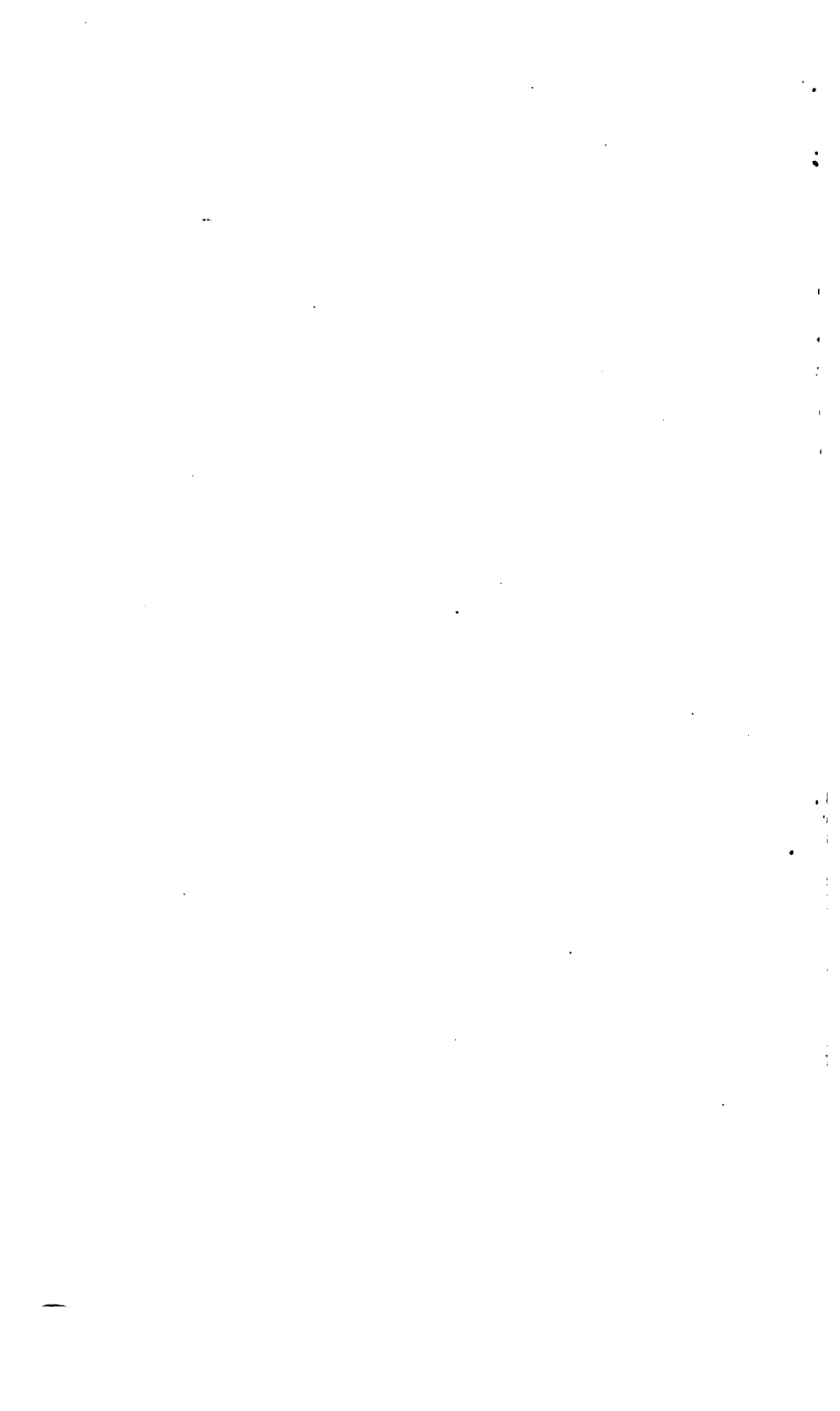
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OF

Cases in Law and Equity *js*

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

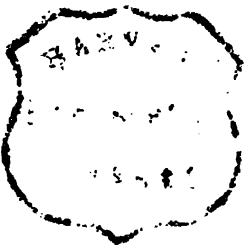
BY OLIVER L. BARBOUR, LL. D.

VOL. XLIX.

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1868.



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DURING THE YEAR 1868.

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- CLASS 1. WILLIAM H. LEONARD.*
" 2. GEORGE G. BARNARD.
" 3. THOMAS W. CLERKE.
" 4. JOSIAH SUTHERLAND.
" 5. DANIEL P. INGRAHAM.

SECOND JUDICIAL DISTRICT.

- " 1. WILLIAM W. SCRUGHAM.††
" 2. JOHN A. LOTT.*
" 3. JOSEPH F. BARNARD.
" 4. JASPER W. GILBERT.

II

THIRD JUDICIAL DISTRICT.

- " 1. RUFUS W. PECKHAM.*
" 2. THEODORE MILLER.
" 3. CHARLES R. INGALLS.
" 4. HENRY HOGEBOOM.

FOURTH JUDICIAL DISTRICT.

- " 1. AUGUSTUS BOCKES.†
" 2. AMAZIAH B. JAMES.*
" 3. ENOCH H. ROSEKRANS.
" 4. PLATT POTTER.

JUSTICES OF THE SUPREME COURT.

FIFTH JUDICIAL DISTRICT.

- CLASS 1. LE ROY MORGAN.*
 " 2. WILLIAM J. BACON.
 " 3. HENRY A. FOSTER.
 " 4. JOSEPH MULLIN.

SIXTH JUDICIAL DISTRICT.

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 " 2. CHARLES MASON.*
 " 3. RANSOM BALCOM.
 " 4. DOUGLASS BOARDMAN.

SEVENTH JUDICIAL DISTRICT.

- " 1. JAMES C. SMITH.*
 " 2. HENRY WELLES.
 " 3. ERASMUS DARWIN SMITH.
 " 4. THOMAS A. JOHNSON.

EIGHTH JUDICIAL DISTRICT.

- " 1. MARTIN GROVER.†
 " 2. CHARLES DANIELS.*
 " 3. RICHARD P. MARVIN.
 " 4. NOAH DAVIS.

JOHN H. MARTINDALE, *Attorney General*.

* Presiding Justice.

† Sitting in the Court of Appeals.

‡ Died July 9, 1867.

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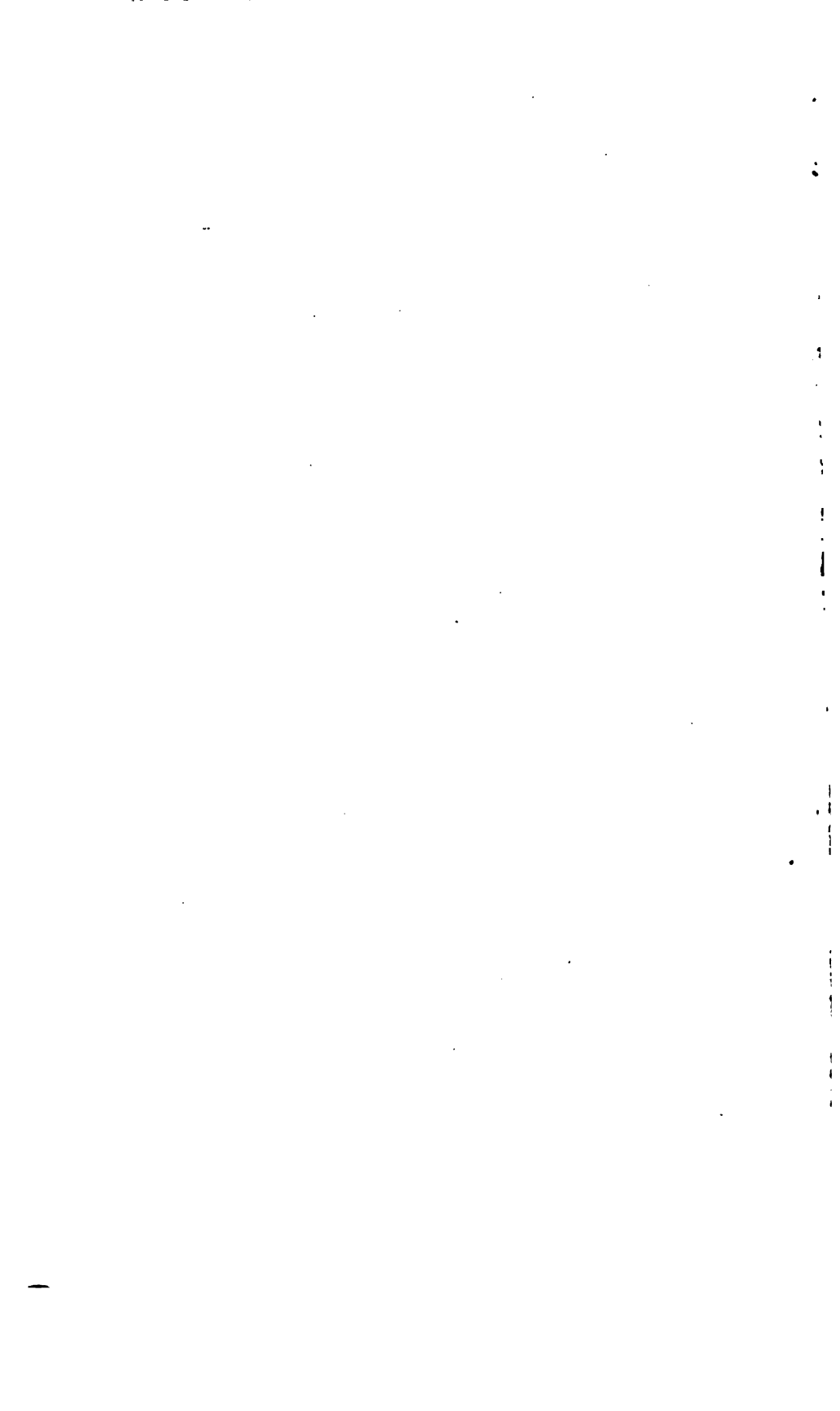
THE PEOPLE *ex rel.* Benjamin Brown, *vs.* DAVID BLAKE.

The act of the legislature, incorporating the village of Edgewater, passed March 22, 1866, provided that there should be seven trustees, four of whom should be elected in May, 1868, and three of whom should be elected in May, 1869, who should hold their office for two years. The act also provided that four persons *named therein* should be trustees from the passage thereof, until the election of their successors in May, 1868, and that three other persons, *named therein*, should be trustees from the passage of the act until the election of their successors in May, 1869. *Held*, that the appointment of the trustees named in the act was in violation of article 10, section 2, of the state constitution.

A WRIT of *habeas corpus* was issued, directed to the defendant, requiring him to have the body of Benjamin Brown, the relator, before Justice GILBERT, at the chambers of the Supreme Court, in the city of Brooklyn, on the 26th day of May, 1866. The defendant made return to the writ, that on the 10th day of May, 1866, by virtue of the warrant annexed to the return, he arrested the relator, and held him

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BY OLIVER L. BARBOUR, LL. D.

VOL. XLIX.

ALBANY:

W. C. LITTLE, LAW BOOKSELLER.

1868.



The People *v.* Blake.

N. Dane Ellingwood, for the appellant. I. The legislature, by the 1st section, title 2, of the act in question, directed the trustees of the village *to be elected by ballot*; and in so doing fully complied with the requisitions of the constitution in that regard. (*See article 10, § 2, of the Constitution.*)

II. By the 4th section of article 10 of the constitution, the legislature is authorized to designate *the time* for the election of all officers named in that article. In conformity with the power so granted, the legislature designated the third Tuesday in May, 1868, and the third Tuesday in May, 1866, as the time fixed for the first annual election of trustees. (*Section 3, title 2.*)

III. It is to be observed that the constitution not only *expressly* permits the legislature to designate the time for the first annual election of trustees, but that such power is granted without such *restriction* or *limitation*; leaving the exercise of such power to the discretion of the legislature. The presumption is that such discretion was, in the present case, exercised for the public good. (*The People v. Draper*, 15 *N. Y. Rep.* 544.)

IV. The makers of the constitution, by granting to the legislature such discretionary power, evidently contemplated a possible interval to arise between the time when an act should take effect and the first annual election of trustees; during which, in the exercise of its plenary powers (*see Tappan v. Gray*, 9 *Paige*, 510) the legislature might appoint *temporary* trustees.

V. J. C. Cavelti, Charles Bischoff and the others named in the second section of the act incorporating the village of Edgewater were appointed *temporary* trustees; and they not being parties to the present proceedings, the validity of that section, so as to affect their appointment, cannot now arise. Until such question does arise and is determined, so as to preclude them from exercising the powers conferred upon them, they are, in contemplation of law, to be regarded

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as officers *de facto*; however questionable their authority may be. (*The People v. Collins*, 7 John. 549.)

It seems to have been admitted that the act in question, so far as it regards the trustees who are directed to be elected by ballot, in pursuance of section 1, title 2, and so far as it regards the time designated for their first annual election, in pursuance of the second and third sections, was made in conformity with the constitution. But the court held that the persons named in the second section, and who were appointed by the legislature to act as trustees until the first annual election, are, in point of fact, "village officers" coming within the meaning of section 2, article 10 of the constitution. This conclusion certainly does not seem to be warranted by the act. The term "village officer," as used in the constitution, is to be understood as designating persons who, with their successors in office, possessed not only like powers, but also *like qualifications* for the office; the term also implies *permanency* in office. In the present case, the trustees, answering to this definition of the term "village officers," are required to "be residents, tax payers and legal voters within the village and their respective wards." (*Sec. 1, title 2.*) It does not appear that the persons named in the second section are either residents or tax payers of the contemplated village, or of either of the wards. In these respects, then, they differ materially from the trustees designated in the first section, and cannot therefore be regarded as *of the same class of officers*. Besides, the first section places the government of the village under seven trustees to be elected by ballot, who are permitted to hold their respective offices until their successors shall be duly elected and qualified, thereby giving *permanency* to the office. Now, can the trustees first to be elected be deemed, in contemplation of law, *successors* to the persons named in the second section, *within the spirit and meaning of the constitution*?

In construing a statute, where words are used which have

The People v. Blake.

a doubtful meaning, the object or intention of the legislature may be resorted to, to explain them. We are told in the case of the *People v. Utica Ins. Co.*, (15 *John.* 380, 381,) that "a thing which is within the statute is not within the statute unless it be within the intention of the makers." The persons named in the second section are called "trustees," it is true, and the trustees referred to in the first section are termed "their successors," that is to say successors of the persons named in the second section; but these terms are both indefinite or uncertain. A trustee may or may not be a "village officer" within the meaning of the constitution, and it may have been used in the present case for the purpose of giving greater facility to the phraseology of subsequent sections of the act; and so again in regard to the term used of "their successors," which may have been intended simply to mean those who were to succeed the persons named in the government of the village, without any reference whatever to the term "successors," as implying permanence in office, within the meaning of the constitution. In order to clear away these apparent ambiguities, it is necessary to inquire what was the object or intention of the legislature. The act took effect immediately on its passage; but the first election of trustees could not take place until May, 1868; and inasmuch as all other acts, inconsistent with the act then passed, were either repealed or modified, (*see* § 14, *title* 7,) it became a matter of necessity that some one or more persons should be appointed to perform the duties of trustees, as prescribed by the third title, until an election could be made; besides, it was a matter of necessity that some one or more persons should be appointed to carry out the requisitions of the act (*see* § 9, *title* 2) *preliminary* to the first annual election of trustees. To accomplish these objects, then, the persons named in the section in question were appointed by the legislature. Our courts will not permit an object or intention, if it be lawful, to be frustrated, when it is apparent or made manifest, although the language

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used to express that object or intention should be inadequate for the purpose. Judge Oakley remarked, in the case of the *People v. The Supervisors of Orange*, (17 N. Y. Rep. 241,) "it is not a light thing to set aside an act of the legislature, even when the objections to its validity are grave and weighty ; when they touch not the substance of the law, or the authority of the legislature to pass it, but are mere criticisms upon its form or phraseology, the exercise of such a power by the judiciary of the state would be prolific of evil and would soon be unanimously condemned." Shall the section in question, then, be declared invalid because the word "trustees," was used in lieu of the word "commissioners," or any other term expressive of an agency ; when the object of the legislature is otherwise made clear and manifest ?

It was assumed, upon the argument in the court below, that the legislature did, by the section in question, intend to abridge the right of the people to elect their own village officers ; but this cannot be presumed. It was remarked by Denio, Ch. J. in the case of *The People v. Draper*, (15 N. Y. Rep. 545,) that "the courts cannot impute to the legislature any other than public motives for their acts." Besides, it is to be observed, that the right of the inhabitants to elect their own "village officers" *did not mature* until the organization should be finally completed by the first annual election of trustees in May, 1868 ; and until such election should take place, the incorporation was, in fact, only partially created, and the right now claimed for the people was inchoate. This was the necessary consequence or effect of the exercise, by the legislature, of the discretionary power conferred upon them by the 4th section of the 10th article of the constitution.

I do not understand the court below to have imputed any wrong or improper motive to the legislature in designating the first Tuesday in May, 1868, (a time fixed definitely, and not *indefinitely*, as was supposed by the court,) for the first

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annual election of trustees. Nor do I understand the court to have passed upon the propriety or impropriety, prudence or imprudence of the exercise, in the present instance, of the discretionary power conferred upon the legislature. But I do understand, however, the court below to have held that the power so conferred *may be subject to abuse*, and that for that reason the section in question was objectionable. This objection may be urged against any law in which a discretionary power may have been granted. In granting such power, the makers of the constitution no doubt reposed the fullest confidence in the legislature, that it would be exercised by them for the public good, and our courts will sustain this presumption, until a case occurs where it is manifest that such confidence has been abused.

It was also urged, in the court below, that there was no power conferred upon the legislature, by the constitution, *to make appointments*; although they might delegate such power to others. This, I presume, was not necessary. They possessed it by virtue of their plenary powers. In speaking of masters in chancery, and some other officers, who by the constitution were only to be appointed by the governor, Chancellor Walworth, in the case of *Tappan v. Gray*, (9 Paige, 510,) remarked: "But as it was merely intended to make a temporary provision for the performance of the duties of these officers, until the offices could be filled in the constitutional mode, I presume it is within the legitimate powers of legislation." Again, in alluding to the general powers of the legislature, Denio, Ch. J. in the case of *The People v. Draper*, (15 N. Y. Rep. 543,) remarked: "The people, in passing the constitution, committed to the legislature the whole law making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitu-

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tional, it is for those who question its validity to show that it is forbidden ;" or in other words, if an attempt be made to invalidate the section now in controversy, on the ground that the legislature had no power to appoint the persons named in that section, it is necessary to show that the constitution, either expressly or impliedly, prohibits it.

I will submit one other ground for the consideration of the court. The persons named in the section in question were at least officers *de facto*, and as such their acts in relation to the subject matter of the present proceedings should have been upheld. The public good required it. All acts inconsistent with the act in question are either repealed or modified, (*see* § 14, *title* 7,) and unless the persons so named are permitted to perform the duties prescribed by the third title, the inhabitants of the contemplated village are, I may be allowed to say, without law.

It was not sufficient to allege that the section in question was unconstitutional, and therefore the persons named did not possess even a colorable authority. That question could not be disposed of so as to oust them from the performance of the duties prescribed by the act, unless in proceedings to which they were made parties, (*see* fifth point ;) and until that question be disposed of, they are, in contemplation of law, officers *de facto*.

Perhaps no more apt illustration of the rule that public policy requires that the acts of persons claiming to be public officers under a colorable authority should be upheld, can be offered, than the case now presented. The relator was charged with a misdemeanor, and arrested. For the purpose of the present argument, I may be allowed to assume that he was guilty of the offense charged. The question then arises, is it allowable that this man should escape the punishment due to his offense because the authority under which the arrest was made is questionable on constitutional grounds ? That question might have been disposed of upon

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an information in the nature of a *quo warranto* against the persons exercising the assumed authority ; and if the section in question, which conferred upon them the authority assumed, had been declared invalid, and their appointment void, the executive of the state might perhaps have been resorted to, to fill a vacancy occasioned "by the decision of a competent tribunal declaring void" such "appointment." (1 *R. S.* 5th ed. p. 413, 7th subd. of the 4th section.) The court below, however, did not feel warranted, in the absence of parties who were to be affected by the decision, to pronounce the section in question invalid and their appointment void ; but the decision that was made, nevertheless, *paralyzed their power*, and accomplished, in effect, what the court refused to do in the case of *The People v. Draper*, (24 *Barb.* 265,) where an application was made for an injunction to restrain the exercise of an assumed authority, whilst proceedings in the nature of a *quo warranto* were pending to test the validity of that authority on constitutional grounds. In delivering the opinion in that case, the judge remarked, (*see pp.* 267, 268,) "I am inclined to think that such relief has not been deemed consistent with the interests of the state, with enlightened policy, or with the general principles which must govern as to an office emanating from the sovereign power, and that hence it has never been adopted in practice ; that the public welfare has been deemed to require that an actual incumbent of an office should not be forbidden to perform the duties of it for the time being, even though his title to the office were doubtful ; that the public should not be deprived of the benefit of an office merely because it was uncertain whether the person in, and ready to perform the duties of it, were there rightfully, even while the title of the party assuming to act should be in controversy. To restrain the action of the incumbent is to restrain all the functions of the office ; for he being in,

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even if wrongfully, no one else can enter until he is removed, and he must act, or no one can."

Lot C. Clark, for the relator.

After hearing the arguments of counsel, upon the appeal, the court at general term, affirmed the decision of Justice GILBERT, adopting his opinion as that of the court.

Prisoner discharged.

[KINGS GENERAL TERM, February 11, 1867. *Lott, J. F. Barnard and Gilbert*, Justices.]

JOHN H. PRENTICE *vs.* ALFRED W. DECKER, treasurer of
Wescott's Express Company.

Common carriers of goods may, by express stipulation, limit their liability for the loss of goods occurring from even the negligence of their agents and servants; or wholly exempt themselves from such liability; and the acceptance by the bailor, from the bailee, in the ordinary course of business, of a receipt for the goods containing such a stipulation, creates a binding contract. But the liability of the carrier will continue, as established by the common law, in respect to all matters not expressly stipulated against.

The putting into the hands of a passenger, on receiving her baggage for delivery at her residence, of a card containing a clause limiting the liability of the carrier to a specified amount, except by special agreement, to be noted on such card, will not, without further proof from which the assent of such passenger to the terms thereof may be implied, establish such a contract.

Such a contract relates only to the carrier's liability as an *insurer* of the goods, and imparts no exemption from liability for actual negligence. And it applies only to deliveries to railroads and steamboats. The legal title to wearing apparel and jewelry, provided by a father for the use of his infant daughter, remains in him, notwithstanding the possession of them by the infant. And for the purposes of an action by the father against a common carrier, to recover for the loss of such property, the daughter must be treated as the legally constituted agent of the plaintiff.

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APPEAL from a judgment entered upon the report of a referee.

Westcott's Express Company is a joint stock company, of which the defendant Decker is treasurer.

On the 2d of November, 1864, Miss Ellen Prentice; a daughter of the plaintiff, under age, delivered at the defendants' office at the Hudson river railroad depot, in New York, for transportation from the depot to the plaintiff's residence in Brooklyn, two trunks containing clothing and jewelry provided for her use by her father. One of the trunks was left exposed and unguarded in the defendants' express wagon, in the street, on a very dark night, and was stolen.

The defendants, in their answer, put in issue the plaintiff's title, and set up a contract with the plaintiff, limiting the defendants' liability to \$100 in case of loss. The defendants were allowed to amend the answer so as to make it conform to the testimony, by alleging that the supposed contract was made with Ellen Prentice.

The referee found, as matters of fact :

1. That on or about the second day of November, 1864, Ellen Prentice, a daughter of the plaintiff, then an infant under the age of twenty-one years, and then and still living with him, in the city of Brooklyn, who had been temporarily absent from her home, arrived in the city of New York by the Hudson river railroad, having two trunks which were brought by the train on which she came, and for which trunks she had two checks.

2. That on the arrival of the said Ellen Prentice in said city of New York, she applied to an agent of the said Westcott's Express Company, in the baggage room or office of the said company, the same being in the building used as the depot of the said railroad company, to have said trunks carried to her place of residence, No. 1 Grace court, in the said city of Brooklyn, and delivered to the said agent the said checks ; and that the said agent, in exchange for said checks, deliv-

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ered to the said Ellen Prentice a card, of which the following is a copy :

“WESTCOTT’S EXPRESS,
FOR THE DELIVERY OF
FREIGHT AND BAGGAGE,
of every description in the cities of

NEW YORK, BROOKLYN,
 WILLIAMSBURGH, JERSEY CITY,
 HOBOKEN, STATEN ISLAND,
 and LONG BRANCH, New Jersey.

Freight forwarded to all parts of the United States.

Telegraph in all our offices to all parts of the United States.

Delivery of baggage to railroad and steamboats to be made to the baggage agent thereof. Liability limited to \$100, except by special agreement to be noted on this card. OVER.

(On the reverse side.)

OFFICES IN NEW YORK :

162, 785 and 945 Broadway ; cor. 6th Ave. and 42d St. ; Hudson River Railroad, 70 Warren Street ; Hudson River Railroad, 30th Street, between 8th and 9th Avenues.

BROOKLYN :

269 Washington Street, City Hall Square.

*****	2	ct.	*****	*****	*****
Stamp, U. S. Int.	6	7	5	0	*****
Rev.	6	6	7	2	*****
	A.	H.	D.		*****

By purchasing your railroad ticket at any of our offices, baggage can be checked from the residence to destination. Rates same as at depot. (over.)”

That the initials A. H. D., under the numbers 6750 and 6672 on said card, are the initials of Alexander H. Dixon, the then agent of said Westcott’s Express Company, at their said office in New York.

3. That so far as any evidence given before him other than the mere delivery of the said card to the said Ellen Prentice,

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showed, or tends to show, the limitation in the said card of the liability of the said Westcott's express was not pointed out to the said Ellen Prentice, nor was her attention in any manner directed thereto, nor was the said card read by her.

4. That the said trunks were brought by the agents or servants of the said Westcott's Express Company, on or about the 2d day of November, 1864, to their office in Brooklyn; and that a driver or servant of the said company started from the said office, in the evening of the same day, after dark, with a horse and wagon, having the said trunks, and two or three other trunks, in said wagon, and stopped at a house in Remsen street, in said city of Brooklyn, to deliver a trunk; and, that, while the said driver or servant was on the stoop of the said house, where he remained three or four minutes; during which he was unable to see the said wagon, on account of the darkness, and no person was in charge thereof, one of the said trunks, being that referred to in the pleadings in this action, was stolen and carried away by some person or persons unknown, and has never been delivered by the said Westcott's Express Company.

5. That the said trunk, so stolen and carried away, contained wearing apparel and jewelry, which the plaintiff in this action had provided, as a parent, at his own expense, for the use of his said daughter Ellen; that the fair and reasonable value of the said trunk and contents, at the time the same were so received by the said Westcott's Express Company, was \$456.35, and that the said amount was wholly lost to the said plaintiff.

And the referee found, as a conclusion of law, from the aforesaid facts, that the plaintiff was entitled to recover of the defendant, as treasurer of the said Westcott's Express Company, the sum of \$456.35, and to have judgment therefor, besides his costs in this action.

On the trial, the defendant's counsel moved for a dismissal of the complaint on the following grounds:

"1. That the plaintiff is not shown to be the owner of any

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of the baggage referred to in the complaint, or to have any interest or property in, or possession of, the said baggage.

2. That Ellen Prentice is shown to be the owner of said baggage, and to have had the possession thereof at the time of its delivery to the defendants.

3. That the plaintiff is not shown to be the assignee of the claim set up in the complaint, or of the daughter's alleged right of action against the defendant.

4. That it does not appear that the plaintiff is the guardian, *ad litem*, of the said Ellen Prentice, or in any way authorized to bring or sustain this action."

Motion denied, and the defendant's counsel duly excepted.

From the judgment entered upon the referee's report, the defendant appealed.

L. A. Lockwood and C. A. Seward, for the appellant.

I. The plaintiff cannot maintain his suit; because he is not shown to be the owner of the baggage, or to have any interest or property in, or possession of, said baggage; and, also, for the reasons assigned in the motion to dismiss the complaint. (a.) The daughter was in possession, and she swears, "*all the articles on the list belonged to me.*" (b.) That the daughter was under twenty-one years of age, (being nineteen,) or that the articles were furnished by the plaintiff, her father, and that she resided with him, does not affect the ownership of the baggage, nor does it conflict with, or modify, her testimony, that the property belonged to her. (c.) The property when furnished to the daughter by her father, affection forming the consideration, became, as she testified, her property. It could not be taken on execution against the father. It would not pass as assets to his administrator. (d.) The real party in interest must sue. (e.) The father, as such, is not the guardian of the property of the child. His guardianship extends only to the custody of the child. (*Fonda v. Van Horne*, 15 Wend. 631, and cases there cited.)

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II. The defendant's liability was legally limited to \$100.

1. Carriers have a right to affix conditions to acceptance of property, for carriage, provided the conditions are not prohibited by law. That they are not unreasonable here. (*See cases cited below.*) 2. The condition that the carrier shall not be liable for over \$100, unless the value is stated, and the extra risk paid for, is not unlawful or unreasonable. (a.) The law compels the carrier to carry the goods, in the line of his business, of every person, on payment of a reasonable compensation. (b.) The law does not fix the amount of compensation. It requires only that it shall be reasonable. (c.) Neither is it unreasonable. (d.) \$100, is more than the average value of articles carried. (e.) The carrier being an *insurer*, is entitled to premium proportionate to the risk assumed. (1 *Pars. on Cont.* 711.) (f.) The extensive business of carriers, and the benefit conferred by them upon the public, require that they should have this protection, except in cases of fraud or conversion. (g.) Occasional losses are unavoidable, and the bare fact of non-delivery of an article, affords no presumption of willful negligence or bad faith. 3. The delivery of the carrier's receipt, containing the \$100 limitation clause, to the sender, at the time of the delivery of the baggage, and the delivery of the baggage by the sender to the carrier, form a contract between them. (*Wells v. N. Y. Cen. R. R. Co.*, 24 *N. Y. Rep.* 182. *Dorr v. The N. J. Steam Nav. Co.*, 1 *Kern.* 485. *Meyer v. Harnden's Ex. Co.*, 24 *How.* 291. *New trial of do. N. Y. Transcript*, March 16, 1864. *Moore v. Evans*, 14 *Barb.* 524. *Parsons v. Monteath*, 13 *Barb.* 358. *Perkins v. N. Y. Cen.* 24 *N. Y. Rep.* 215. *Smith v. The same*, 223. *Bissell v. The same*, 25 *id.* 445. *The N. J. Nav. Co. v. Mer. Bank*, 6 *How. U. S.* 382. *Breese v. U. S. Tel. Co.*, 45 *Barb.* 274. *Moriarty v. Harden's Express Co.*, 1 *Daly*, 227. *York Co. v. Central Railroad Co.*, 3 *Wallace*, 107.) The acceptance of an offer, coupled with a condition, is an acceptance also of the condition. 4. From the nature of the carrier's

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business, it was impossible for him to do more than to deliver to the sender—upon the very receipt given her at the time, and which is the only evidence of her delivery of baggage to him—the printed conditions of his undertaking. (a.) There is no evidence that she did not know the contents of that receipt, and the presumption is that she did know it. In the case of *Boorman v. The American Express Co.*, on appeal, the Supreme Court of Wisconsin enunciates this doctrine, and Dixon, Ch. J. giving the opinion of the court, says: “Where a receipt for the package, embodying such conditions, (in that case the limit was \$50,) is shown to have been in the custody of the plaintiff, due delivery of it to him, and his assent to its terms, are to be presumed. (*Case reported in N. Y. Times, Dec. 3, 1866.*) 5. That the sender did not read or know the contents of the receipt, is his own fault, and does not affect the question. (104 *Eng. Com. Law. Rep.* 75. *Com. Bench R., N. S. vol. 12. Breese v. U. S. Tel. Co. above cited. Dorr v. N. J. Steam Nav. Co. cited above. Shaw v. Railway Co., 66 Eng. Com. Law Rep.* 347. *York, Newcastle and Berwick Co. v. Crisp, 25 Eng. Law and Eq.* 396. *York Co. v. Cent. Railroad Co., 3 Wallace, 107.*) 6. If the court should hold that the property was in the father, and not in the daughter, then the daughter must be held to be the agent of the father, as to the baggage, and empowered to make all legal contracts for its carriage. (*Angell on Car. §§ 249, 250, 251.*) If such person had a right by such delivery to impose an obligation upon the defendants, in respect to the baggage, she had an equal right to assent to any lawful terms, by which the defendants sought to control such obligation. The delivery of the baggage and the reception of Exhibit 1, were simultaneous acts, and constituted but one contract between the parties. (*Moriarty v. Harnden's Express. York Co. v. Central Railroad, above cited.*) In *Dorr v. N. J. Steam Nav. Co.*, above cited, the court says: “The exception to the common law liability, being made in the bill of lading, and delivered to the agent (in that case a carman) of the plain-

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tiff's, must be deemed to have been agreed upon by the parties." By bringing the suit, the plaintiff has ratified the act of the agent. (*Bank of U. S. v. Davis*, 2 Hill, 451. *Sutton v. Dillaye*, 3 Barb. 529.) Judgment should be reversed, with costs; or, should the court hold that the action is properly brought, then the plaintiff should have judgment for \$100, with costs to November 20, 1865, the date of the defendants' offer of judgment.

J. M. Van Cott, for the respondent. I. The findings of fact are in literal accordance with the evidence, there having been no conflict of evidence.

II. Wearing apparel, provided by a father for the use of a child under age living in his family, is presumptively the property of the father.

III. If the plaintiff was the owner of the baggage, the pleadings do not present the defense of a contract, limiting the defendant's liability. The averment of such a contract with the plaintiff, was struck out by amendment, and the averment of such a contract with a stranger substituted.

IV. The pasteboard baggage check did not import a contract. 1. Its obverse side contains the whole check, and suggests no limitation of liability, and no reference to any such limitation. 2. The word "over" at the bottom, was not sufficient to require attention to what seemed a mere business card on the other side. 3. At most, the business card was a notice, and a carrier cannot limit his liability by notice. And the whole scope of the notice is, that passengers can check their baggage *from their residences to destination, subject to the limited liability specified.*

V. If the notice at the foot of the business card imports a contract, it applies only to cases of deliveries to railroads and steamboats, in respect of which the carrier's risk is greater than in deliveries from them. (*Price v. Powell*, 3 Comst. 322. *Miller v. Steam Nav. Co.* 10 N. Y. Rep. 431. *Russell Livingston*, 16 id. 515.)

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VI. If the court holds that the check imports a contract, and that it applies to the baggage in question, then we say :
 1. That the contract relates solely to the carrier's *extraordinary* liability as *insurer*. It is conceded that such liability as insurer, may be limited as to amount, and as to the circumstances under which the risk shall attach, by express contract.
 2. But a contract broad enough to exclude the entire *extraordinary* liability of a carrier, and so to negative the carrier's implied obligation as an insurer, leaves his *ordinary* liability as a bailee in full force. As an *ordinary* bailee for hire, his duty is to guard the property with care, and he is liable for any loss or injury occasioned by his gross negligence. A stipulation against liability for gross negligence, in effect a stipulation for an entire breach of his duty as bailee, would be void, as against public policy. (*Merritt v. Earle*, 29 N. Y. Rep. 115. *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. U. S. 344. *York Co. v. Central Railroad*, 3 Wallace, 107. *Dorr v. N. J. Steam Nav. Co.*, 1 Kern. 485. *Wells v. The Steam Nav. Co.*, 4 Seld. 375. *Alexander v. Greene*, 7 Hill, 533. *Wells v. The New York Central Railroad*, 24 N. Y. Rep. 182. *Perkins v. The N. Y. Cent. R. R. Id.* 196. *Smith, adm'r v. N. Y. Cent. R. R. Id.* 222. *Bissell v. N. Y. Cent. R. R.* 25 *id.* 442. *Stinson, adm'r v. N. Y. Cent. R. R.* 32 *id.* 333. *Malone v. Boston and Worc. R. R. Co.*, 12 Gray, 388. *Brown v. Eastern R. R. Co.* 11 Cush. 97.)
 3. If such a contract can be supported at all, certainly every legal presumption must be made against it. (*See cases last cited.*)

VII. If there is any valid contract for exemption, applicable to the facts of this case, it amounts to this : the company, by reason of its *extraordinary* responsibility as a common carrier, shall not be liable as insurer beyond the sum of \$100.

That contract leaves the defendant's ordinary liability as a bailee, for gross negligence, intact and in full force. The referee has found, as a fact, that the defendant was guilty

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of gross negligence ; and that finding was compelled by the evidence. The judgment should therefore be affirmed.

By the Court, GILBERT, J. The baggage which is the subject of this action having been provided by the plaintiff for the use of his infant daughter, in fulfillment of his obligation to give her suitable maintenance, there can be no doubt that the legal title to the goods remained in the plaintiff, notwithstanding the possession of them by the infant.

It is equally clear that, for the purposes of this case, the daughter must be treated as the legally constituted agent of the plaintiff.

The daughter was a passenger on the Hudson River Railroad, and on her arrival in New York delivered the checks for the baggage in question at the defendants' office, at the railroad station, with directions that the baggage should be carried to her residence in Brooklyn, and received the card of the defendants, on one side of which was printed, "Westcott's Express for the delivery of freight and baggage, &c. &c." At the bottom of the card, the following statement was printed : "Delivery of baggage to railroads and steamboats to be made to the baggage agent thereof, liability limited to \$100, except by special agreement to be noted on this card."

The baggage was lost while in the defendants' charge, and the referee has found that such loss was occasioned by gross negligence of the defendants.

These principles must be deemed settled ; namely, that common carriers of goods may, by express stipulation, limit their liability for the loss of goods occurring from even the negligence of their agents and servants, or wholly exempt themselves from such liability ; and that the acceptance by the bailor, from the bailee, in the ordinary course of business, of a receipt for the goods, containing such a stipulation, creates a binding contract.

But it is equally clear that the liability of the carrier will continue, as established by the common law, in respect to all

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matters not expressly stipulated against. We are also of the opinion that the putting into the hands of a passenger of a card like that of the defendants, under the circumstances of this case, would not, without further proof from which the assent of the bailor to the terms thereof might be implied, establish such a contract. (*Brown v. Eastern R. R. Co.*, 11 *Cush.* 97.) Applying these principles the recovery below was right.)

I. The contract relates only to the defendants' liability as an insurer of the goods, and imparts no exemption from liability for actual negligence.

II. It applies only to deliveries to railroads and steamboats.

III. The facts do not warrant the legal inference that Miss Prentice gave her assent to the statement in the card which it is claimed limited the defendants' liability.

The judgment, therefore, must be affirmed with costs.

[KINGS GENERAL TERM, February 11, 1867. *Lott, J. F. Barnard and Gilbert*, Justices.]

THE PEOPLE *ex rel.* Francis H. Duff, *vs.* SAMUEL BOOTH,
mayor of the city of Brooklyn.

The granting or refusing of the writ of mandamus, is a matter of discretion.

To entitle a party to that remedy, there must be a clear legal right, not merely to a decision in respect to the thing, but to the thing itself.

Where it is doubtful whether a person in whose favor a warrant is drawn upon the treasurer of the city of Brooklyn, by the comptroller, is entitled to the money, there being another claimant, who has sued the city therefor, the mayor is not obliged to sign the warrant; and cannot be compelled to do so, by mandamus.

There is nothing in the charter of the city, or in the general statutes of the state, authorizing the comptroller to adjudicate the question of title to the money, in such a case; and the mayor is not controlled by his action, and bound to sign the warrant as a mere ministerial act.



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APPEAL from an order made at a special term, denying a motion for a mandamus, to compel the defendant, as mayor of the city of Brooklyn, to sign a warrant issued by the comptroller in favor of the relator, for money claimed to be due him from the city as surviving partner of John F. Barrett, deceased.

An affidavit of the relator was presented to a justice of this court, setting forth the following facts, viz: That he was the surviving partner of the firm of John F. Barrett and Francis H. Duff; that in the latter part of March, 1865, he entered into partnership with the said J. F. Barrett, in the work to be done under the contract which said Barrett had obtained from the city of Brooklyn, for repairing streets of said city for the western district thereof, and became at that time and from thence until now, he has been and is now jointly interested with said John F. Barrett in said contract, and the work done thereunder, and the money due thereon; that at the time aforesaid, the deponent and the said John F. Barrett, entered into a general partnership to do the work under said contract, and also to do jobbing work for private parties, and continued to work together under said agreement, which was by parol, until the death of said John F. Barrett, which took place on the 4th day of November, 1865; that the deponent had contributed at different times, between the time of making such agreement and the death of said Barrett, in cash, the sum of about \$1500, which said money was used by Barrett in paying the men and buying horses and tools used in said business, and for feed for the horses used in said work; that Barrett during his lifetime always collected the money due from the city upon said contract, as the work progressed, collecting in all from said city, seven payments under said contract, each payment being monthly payments; that on or about the first day of September, 1865, the said John F. Barrett signed the following paper, and delivered the same to the deponent:

"I hereby certify that Francis H. Duff, of the city of

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Brooklyn, is jointly interested with me in the contract which I have with the city of Brooklyn for repairing the streets of the city of Brooklyn W. D., said contract bearing date March 15, 1865, and that he is joint owner with me in six horses and carts, and six sets of harness used in the work under said contract, and that he is jointly interested with me and entitled to one half of the money due from the city of Brooklyn on said contract, and also that he is general partner with me, and jointly interested in all jobbing and work done by me, either under said contract or with private parties.

[Five cent
revenue stamp.]

(Signed,) JOHN F. BARRETT."

That all the money the deponent ever received from said partnership, or on account of the money due under said contract, was the sum of \$700. That there is due to him from said partnership, on account of said contract, and the work done thereunder and for job work done by said partnership, more than the amount of money coming from said city for work under said contract, and that said Barrett received in his lifetime more than the amount of his share of the money due under said contract; that said contract expired March 15, 1866; that there is due to the deponent, as surviving partner of said John F. Barrett, deceased, from said city of Brooklyn, five monthly payments under said contract, to wit, from October 15, 1865, to March 15, 1866, amounting in all, including the thirty per cent kept back until final payment, to \$7679.39; that after the completion of said contract the deponent made out bills for said five monthly payments in his name as surviving partner of John F. Barrett, deceased, and presented the same to the street commissioner of the city of Brooklyn for certification; that said street commissioner attached thereto his certificate that the work was completed, and that there was due the contractor the said sum of \$7679.39, whereupon the deponent presented said bills and said certificate to Mayor Booth for approval; that his honor

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indorsed his approval thereon, under advice of the corporation counsel, as stated by him in his approval ; that thereupon the deponent presented said bills so certified and approved to the auditor of the city of Brooklyn, who, on the 16th day of July, 1866, audited the same and attached his certificate thereto ; that thereupon said deponent presented the said bills, certified, approved and audited as aforesaid, with the certificates attached thereto, to the comptroller of the city of Brooklyn, and demanded the money thereupon ; that said comptroller issued his warrant, dated July 16, 1866, directed to the treasurer of the city of Brooklyn, directing him to pay to Francis H. Duff, surviving partner of J. F. Barrett or order said sum of \$7679.39 ; that thereupon the deponent presented said warrant to his honor Mayor Booth, for his signature, when his honor the mayor declined to sign the same, and that it is necessary to obtain such signature thereto, before he can obtain said money.

On reading this affidavit, an order was granted, directing the defendant to show cause why a mandamus should not issue, to compel the defendant as such mayor, to sign the warrant issued by the comptroller of the city of Brooklyn to said relator, as stated in his affidavit.

On showing cause at special term, an affidavit of the defendant was read, setting forth the following facts, viz :

That he, the defendant, refused to sign the warrant mentioned in the order issued herein, because Francis H. Duff, the person to whom the same is drawn, was not entitled to the sum named therein from the city of Brooklyn, or to any part thereof ; that he is not the surviving partner of John F. Barrett, deceased, and never was a partner of said Barrett. That said Duff has no claim upon any moneys due upon the contract of said Barrett, referred to in his affidavit ; and that the partnership agreement thereto attached and referred to, was never signed by said Barrett, as the deponent verily believed. That the executor and legal representative of said Barrett denies that said Duff was ever a partner of said deceased, or

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interested in the contract aforesaid, or entitled to any money due thereon, and claims the money for which the said warrant mentioned in said order was drawn, and had, some time before the making of said order, commenced a suit in the city court of Brooklyn, to recover the same from the city of Brooklyn, claiming to be the only party interested therein, or entitled thereto. That at the time the said warrant was presented to the defendant for signature, the counsel of the city was preparing the necessary papers for an application to said court, to have said Duff substituted in the place of said city, in said action, as the defendant therein, which papers have since been served upon said Duff, being a notice of motion for such substitution and affidavit according to the form required by law. That the certificate of the auditor to the bills of said Duff, for which the said warrant was issued, and the said warrant, were issued by arrangement with said Duff, and against the advice of the legal adviser of said auditor and comptroller, as officers of the said city, and for the purpose of preventing the city from having an adjudication by a competent court, as to which of said claimants, the executor of said Barrett aforesaid, or said Duff, was entitled to the sum due upon said contract, before the payment thereof to said Duff, who is wholly irresponsible and of no pecuniary means. That the defendant, in his capacity of mayor and head of the city government, having investigated the circumstances connected with the claim of said Duff and the action of the said subordinate city officer thereon, did discover the facts and circumstances to be as above stated. That said comptroller and deponent had, and have no authority to issue or sign the warrant referred to. That the common council of said city has never ordered the payment of the money for which said warrant is drawn, and such warrant was issued without authority of said common council, and not in pursuance of an order of said council. That the bills aforesaid have never been approved by the mayor of said city, or certified by the street commissioner ; that deponent has never

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approved of the same ; and that the allegations in the affidavit of said Duff, that the said bills were approved by him were untrue.

An affidavit of J. Oakley Nodyne, the street commissioner, was also read, denying that he had certified the bills of said Duff, for and on account of which the warrant was drawn, and alleging that the statement in the affidavit of said Duff, that the said bills were certified by the street commissioner of said city were untrue.

Other affidavits were also produced and read by the defendant, among which was that of the executor of Barrett, in which he claimed the money, as belonging to the estate of Barrett, and denied that the relator was entitled to the same.

The motion for a mandamus was denied, and the relator appealed.

Crooke & Bergen, for the appellant. I. The warrant was issued upon bills duly certified by the street commissioner, approved by the mayor, audited by the auditor, and presented to the comptroller in due form of law.

II. The duty of the mayor, in signing the warrant, is purely a ministerial act, and he has no discretion. (*Lynch v. Livingston*, 2 *Seld.* 422.) It is only necessary that he should sign the warrant, because the charter provides, (title 3, § 15,) that "no money shall be drawn or paid out of the treasury, except in pursuance of such orders appropriating the same, and upon warrants signed by the mayor, or acting mayor, and comptroller, and countersigned by the city clerk, or, in his absence, by his assistant." 1. The mayor has no discretion about it ; he is given none by the charter ; he cannot supervise the action of the auditor or comptroller ; it lies entirely with them, to pass upon the validity of the claim, and their action is *res adjudicata*. 2. The charter expressly provides : "He (the comptroller) shall also, under the direction of the common council, prepare the annual statement

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hereinbefore directed to be published, *and manage all the financial concerns of the corporation*, in addition to such duties as may be required of him by law." (*Title 3, § 13.*) He may appoint a deputy comptroller, for whose acts he shall be responsible. "He may administer an oath to any person or officer who shall be required to render any account, or make any return to him, or furnish proof of his right to receive any sum of money, or any evidence of indebtedness from the said comptroller, or from the city of Brooklyn." His duties here are clearly judicial in their nature, and are *res adjudicata*. 3. Title 3, section 17, of the charter, provides, in respect to the auditor: "It shall be his duty to examine all bills presented against the city for payment. No claims against the city, or for local improvements, or otherwise however, shall be paid, unless he shall certify the same to have been incurred under the authority of law, and that the services have been rendered, or the materials furnished, for which such bills may be presented, and that the charges are just and reasonable, or according to contract; he may require the oath mentioned in section 12 of this title, and may administer the same." We submit that his duties are clearly judicial in their nature, and are *res adjudicata*. The mayor is given no such power or authority. The charter simply provides that the warrant, which shall be issued by the comptroller, upon such proof and certificate, shall be signed by him. 4. The comptroller is the financial officer of the city, and is only responsible to the common council of the city for his acts. (a.) The charter, (*title 2, § 13, subd. 1,*) provides, the common council shall have power "To manage and regulate the finances and property, real and personal of the city." (b.) Title 3, § 13, provides that the comptroller shall, *under the direction* of the common council, manage all the financial concerns of the corporation. The mayor has no control over him. Again, title 10, section 1, prescribes that the accounts of the city and management of its finances shall be under the direction of the

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comptroller of said city, subject to the provisions of this act, and to the ordinances of the common council.

III. The writ lies to command an elected officer to discharge all the duties belonging or annexed to the office. (*Tapping on Mandamus*, 238, and cases cited.)

IV. The only question before this court is whether, after a claim has been properly certified and audited, and a warrant for the money issued by the proper financial officer of the city, the comptroller, the mayor has a right to refuse to sign the warrant. We submit that he has not, and that a peremptory mandamus should issue to compel him to sign the warrant.

V. The charter, title 3, § 15, expressly says, that the warrant shall be signed by the mayor, *or acting mayor, &c.* Thus showing, that the act of signing the warrant is purely ministerial, as it may be done by the acting mayor as well as by the mayor. (*See Lynch v. Livingston*, 2 Seld. 422.)

VI. It is well settled that a mandamus is the appropriate remedy, and will lie to compel the defendant to sign the warrant. In the case of *McCullough v. Mayor, &c. of Brooklyn*, (23 Wend. 461,) Judge Bronson says : " Although, as a general rule, a mandamus will not lie where the party has another remedy, *it is not universally true*, in relation to *corporations and ministerial officers*. Notwithstanding they may be liable to an action on the case for neglect of duty, they may be compelled, by mandamus, *to exercise their functions according to law*." And the court held a mandamus to be the proper remedy in that case. Again, in the case of *The People v. Steele*, (2 Barb. 418,) Judge Edmonds says : " It is well settled that as to corporations and ministerial offices, the existence of another and an adequate remedy is no objection to awarding this writ." (*See also The People v. Flagg*, 17 N. Y. Rep. 588, Comstock, J.) The charter, (title 11, § 120,) as amended 1862, provides : " The city of Brooklyn shall not be liable in damages for any non-feasance or misfeasance of the common council, *or any officer of the city, or appointed*

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by the common council, of any duty imposed upon them, or either of them, by titles 4 and 5 of this act, *or of any duty enjoined upon them, or any or either of them, as officers of government, by any other provision of this act, but the remedy of the party, or parties, aggrieved for any such non-feasance or misfeasance, shall be by mandamus, or other proceeding or action, to compel the performance of the duty.*" Now, this is a duty enjoined upon the defendant, as mayor of the city of Brooklyn, to sign this warrant, and the charter itself prescribes the remedy upon refusal.

VII. The case of *The People ex rel. Green v. Wood*, (35 Barb. 653,) is relied upon as authority for denying this motion. That was an appeal from an order made at special term, in New York, granting a peremptory mandamus against Mayor Wood, to compel him to sign a warrant drawn by the comptroller of New York, for money under a contract, and was decided entirely upon the provisions of the charter, and ordinances, of the city of New York, which differ in many material respects from the charter and ordinances of Brooklyn. That case was decided upon the principle that a mandamus was not the remedy; that he had his action at law, and that only the city could resort to this remedy to compel its officers to act. This principle does not apply here, because the charter of Brooklyn, as amended in 1862, expressly takes away the right of action, and substitutes the proceeding by mandamus. A large portion of the opinion of Judge MULLIN, in that case, was *obiter*, and so stated to be by him. It was conceded, in that case, that the work for which the money was claimed had never been performed; while, in this case, it is conceded that the work has been performed, and that the money is due.

John J. Schumaker, for the respondent. I. The relator is not in a position to compel the mayor by mandamus to sign the warrant herein, by the special provisions of the charter.

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1. Warrants can only be issued for the payment of money in pursuance of orders made by the common council. (§ 15, *title 3, city charter*.) In this case the relator does not allege that any such direction has been made, and no such order in fact has been had. 2. The bills of the relator have not been approved by the mayor, or certified by the street commissioner, as required by the charter, section 8, title 6, (*Laws of 1865, p. 1440*.) This is also an essential prerequisite to the issuing of a warrant for their payment. Both the mayor and street commissioner swear positively that they have not approved and certified the bills.

II. This proceeding is substantially directed at the city of Brooklyn and its treasury. The mayor is the nominal party only. It is simply an attempt to collect a disputed claim or debt by mandamus "for which object this writ was never designed." (*People v. Thompson, 25 Barb. 73*.) The affidavits show that Duff is not entitled to the money. That there is another claimant who is entitled to it—not only his right is not a "clear legal right," but that another party is absolutely entitled to the money. The relator has also an adequate remedy at law, by the commencement of a suit. But not even this is necessary, as the affidavits show that a suit has already been commenced against the city by the other claimant, and the city has moved to have the relator substituted in its place. The mandamus therefore will not lie, on general principles. 1. Because the relator has not a "clear legal right" to the money. (*People v. Supervisors of Chenango, 11 N. Y. Rep. 563. People v. Ransom, 2 id. 490*.) 2. Because the relator has an adequate remedy by action and interpleader. (*See cases above cited and Judge Beardsley's brief in first case, 1 Kern. 568*.)

III. It is expressly held that the mayor should refuse to sign or countersign a warrant when he thinks the payment improper and unjust, and that in the event of his refusal the parties must resort to action, and that a mandamus will not

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lie ; and that he can be coerced by mandamus only when there has already been some adjudication on the claim presented. (*People ex rel. Green v. Wood, Mayor of N. Y. 35 Barb. 653. See also § 11, title 3, city charter, and § 2, art. 2, ch. 1, of city ordinances.*)

IV. The result of the issue of a mandamus herein would be to compel the payment, without trial or adjudication of the right of the opposite claimant, of over \$7000 from the city treasury, to a person not a party to any contract with the city—the payment of an alleged claim which is wholly disputed, and which to say the least has a very strong flavor of fraud.

By the Court, GILBERT, J. Upon the evidence disclosed by the affidavits, it is, at least, doubtful whether the relator is entitled to the moneys for which the warrant was drawn ; and I am constrained to say that I can find nothing in the papers before me which made it the duty of the comptroller to draw the warrant in favor of the relator. The contract was with Barrett. He is dead. *Prima facie* his legal representatives are entitled to the money due from the city. The relator claims that he was a partner, and produces a certificate to that effect, alleged to have been signed by Barrett. This is denied, by disputing the genuineness of the signature of Barrett to the certificate, and other facts. It further appears that the executor of Barrett has sued the city to recover the money for which the comptroller drew the warrant in favor of the relator. I can find nothing in the charter of the city, or in the general statutes of the state, authorizing the comptroller to adjudicate the question of title to this money.

The action of the street commissioner related only to the doing of the work, and that of the auditor related only to the legality of the employment and the amount of the bills. These certificates had no effect upon the right to receive the

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money. The question, therefore, is whether the mayor was controlled by the action of the comptroller and was bound to sign the warrant as a mere ministerial act. I think not. The argument of the counsel for the relator would be applicable if the question related only to the amount, because the mayor would be bound by the determination of the officers to whom the statute had confided the specific power on that subject; but the power of determining a litigated claim against the city has not been vested in the comptroller, or of any of the city officers, to the exclusion of the mayor, and it is very clear that a statute making such a determination binding on the representatives of Barrett would be void.

The provision of the charter is that no money shall be drawn or paid out of the treasury except upon warrants signed by the mayor, or acting mayor, comptroller, and countersigned by the clerk. It is contended that the power conferred upon the comptroller to manage the financial affairs of the corporation and administer oaths to persons presenting claims against it is exclusive in its nature, and that the mayor is vested with no discretionary check in respect to payments out of the city treasury, but is under a legal obligation to sign every warrant which has the signature of the comptroller. I cannot assent to this. On the contrary, I think the mayor has the power, and that it is his duty to take care that no money is drawn out of the treasury except in pursuance of law. In the present case, the appropriate remedy is by action against the corporation. The mayor, I think, had the power, and properly exercised it in refusing to sign the warrant in question; but if I am wrong on this point it does not follow that the relator is entitled to the writ of mandamus. The granting or refusing the writ is a matter of discretion, and under the facts of the case I think it ought to be refused. For, as was said by Judge EMOTT, in *The People v. The Contracting Board*, (27 N. Y. Rep. 381,) to entitle a party

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to this remedy, "there must be a clear legal right, not merely to a decision in respect to the thing, but to the thing itself."

The writ is refused ; the order to be entered at three days' notice.

[KINGS GENERAL TERM, February 11, 1867. *Lott, J. F. Barnard and Gilbert, Justices.*]

ELIZA C. L. FREEBORN and SARAH A. VEDDER vs. JOHN W.
WAGNER.

A testator devised to his wife and daughter, each, the equal one half part of his estate, real and personal, share and share alike, subject to these restrictions, viz. that each of the devisees was vested with a power of testamentary disposition, unaffected by any trust or limitation ; but in case of the death, *intestate* and *without issue*, of either devisee, whatever might remain of the said property, was devised to the survivor. *Held* that each devisee might, during her lifetime, dispose of the entire fee of the estate devised to her, for her own benefit ; and that the devisees having united in a conveyance to a purchaser, of the premises, with covenant of warranty, such conveyance passed all the title of the grantors, either vested or contingent ; that such title was good, and the purchaser in equity was bound to accept it.

Held, also, that any execution of the power of testamentary disposition, made after the execution of the said conveyance could have no manner of effect upon the estate thereby conveyed.

It is a mistrial for the judge at the circuit to direct judgment to be entered for the plaintiff subject to the opinion of the court at general term ; and the case will be sent back, unless the parties consent to a modification of the decision.

ON the 19th day of January, 1860, James Outwater made in due form of law his last will and testament, which has been duly admitted to probate by the surrogate of the county of Dutchess, as a will relating to both real and personal property.

By the "*First*" clause of this will, the testator provides as follows : "I give, devise and bequeath all my real and personal property and estate of every nature and kind, to

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my dearly beloved wife Eliza C. Outwater, (now the plaintiff Freeborn) and to my beloved daughter Sarah Augusta Outwater, (now the plaintiff Vedder) each the equal one half part thereof, share and share alike. *Subject* to the restrictions and provisions in the second item of this my will stated and contained." * * *

"*Second.* My wife at any time after my decease may make such testamentary disposition of the property and estate hereinbefore given to her, as shall seem to her to be just and proper; but in case of her death intestate and without issue, then she shall be deemed to have held the same in trust *for and during her life only*, and *not absolutely or in fee*, in which case I give, devise and bequeath whatever may remain of the same property and estate to my daughter Sarah Augusta, and in case of the death of my said daughter without issue and intestate she shall be deemed to have held the property and estate hereinbefore given to her in trust *for and during her life only and not in fee or absolutely*; in which case I give, devise and bequeath whatever may then remain of the same property and estate to my wife."

On the 18th day of September, 1865, the plaintiffs entered into an agreement in writing, whereby they agreed to convey to the defendant (who resided in the county of Columbia at a distance from the premises in question and who was ignorant of the plaintiffs' title and supposed it to be perfect,) for the sum of \$11,000, a certain hotel, a part of the real property of the testator, by a deed which should convey to him the fee simple of said premises free from all incumbrance, which deed they agreed should contain a general warranty and the usual full covenants. On the 1st day of May, 1866, the plaintiffs tendered to the defendant a deed of the premises mentioned in the contract, which the defendant refused to receive, upon the ground that the plaintiffs were not seised of, and could not convey to him, the estate called for by the contract.

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This action was brought to compel a specific performance by the defendant of the contract above referred to. The defendant claimed that the plaintiffs were not seised of a fee simple absolute in the said premises, and could not by the deed tendered convey to him such an estate therein.

On the trial at the circuit, before Justice BARNARD, the following were admitted to be the facts in this case :

1. That the plaintiffs and defendant entered into the contract set forth in the complaint.

2. That James Outwater, deceased, was, in his lifetime and at the time of his death, seised in fee of the premises described in said contract, free of all incumbrances.

3. That at the time of his death, on the 8th day of August, 1862, he left a last will and testament, of which that set forth in the complaint is a copy, which was duly proved and recorded as a will of real and personal estate.

4. That the plaintiff, Eliza C. L. Freeborn, is the widow, and the plaintiff, Sarah A. Vedder, is the only child and sole heir at law of said James Outwater, deceased, and they are the devisees named in the will, and that at the time of his death, his father, Peter Outwater, and brothers, sisters, nephews and nieces of said James were living, and all of them still survive except one brother.

5. That on the 1st of April, 1866, the premises were vacated by George Shoemaker, the tenant, the same being a hotel. That the defendant was duly notified thereof by the plaintiffs by mail on the 2d of April, 1866, the defendant at that time living at Livingston, Columbia county, N. Y., and the plaintiffs at Tivoli, N. Y. That on the 1st of May, 1866, at the place in said agreement or contract stated, the plaintiffs tendered to the defendant the deed referred to in the complaint, the premises being then free of incumbrances, and demanded the purchase money, mortgage and insurance according to the provisions of the contract, which the defendant refused to perform, on the ground that the plaintiffs

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were not seised of and could not convey to the defendant the estate called for by the contract.

Upon the foregoing facts the judge found as conclusions of law :

1st. That, by the deed tendered, an absolute estate in fee simple, free of all incumbrances, would have been transferred to the defendant.

2d. That the defendant should have received said deed and paid the purchase money according to the terms of the contract. And he directed judgment for the plaintiffs, with costs, subject to the opinion of the general term ; and these conclusions of law were found subject to such opinion.

John Thompson, for the plaintiffs. I. It was clearly the intention of the testator, to give all his property to his wife and daughter, each the one half part of the estate. It gives each the fee of one half, to descend to the issue of each, if there should be issue subsequently, and subject to testamentary appointment by each, of their respective parts or shares, if they, or either of them, might choose to make any testamentary disposition thereof. The legal meaning of the devise, with these badges indicating the intention to vest the fee of one half in each, cannot be mistaken ; so that independent of the statute, (1 R. S. 748, § 1,) it must be held that the devise means, "*to the devisees named and their heirs,*" and this legal meaning is not changed or controlled by any expression whatever in the will, indicating any intention that the inheritance should be thereafter claimed by the testator's heirs. The intention of the testator, and the terms of the statute, unite to pass *the fee to the devisees and their heirs*. (1 R. S. 749, § 4.) This intention is to be carried into effect. (1 R. S. 748, § 2.) It is equally plain that the expectant estate which the one may have in the share of the other, in case of death, intestate, and without issue, relates only to "*whatever may remain of the same property and estate,*" or, as stated in the last line, "*whatever may then*

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remain of the same property and estate," clearly as to what was disposed of by them, and that which does not THEN remain of the same property and ESTATE, that is, when the devisees, or either of them, come to die, is subject to no restriction whatever; and by the terms of the first clause of the will, the absolute devise is *subject only* to the provision in relation "to whatever may then remain." In order that no claim, through the testator, should be made by any person, or persons, other than those named in the will, he created a survivorship *as to what remained* of the same property and estate, if either devisee died without issue or appointment, thus implying the right and probability of alienation by one, or both, of a portion at least of the property; and this strengthens the position that the testator *intended* to limit the fee to these devisees. The second clause of the will contains no such clear qualification of the absolute devise in fee as to render that estate in whole, or in part, indisposable by the devisee; there is no counter-action of the legal import of the devising clause, but rather a confirmation of it at the utmost; the second clause applies only to so much as the devisees should not dispose of, and if this construction does not obtain, then the provisions referred to are repugnant to the first devise and void. (*Helmer v. Shoemaker*, 22 Wend. 137, 139.)

II. During the life of both the devisees, each one of them has the fee of one half the real estate devised, with the expectancy of a future estate or interest in the other half. This fee, whether absolute, *qualified, base or determinable*, (6 Hill, 701,) with the expectant estate of each in the one half held by the other combines all interests and possibilities, and these future expectant estates may be conveyed as well as the fee in possession. 1 Revised Statutes 674, section 35, authorizes the conveyance of expectant estates. (19 N. Y. Rep. 385. 12 id. 138. 31 Barb. 562. 7 Paige, 76.) All these interests and possibilities being covered by the full covenant warranty deed tendered to the purchaser, he would acquire a perfect

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title by that deed. Should one of the devisees die *without issue*, which means issue living at her death, (1 *R. S.* 673,) and *intestate*, the other would become seised in fee of whatever of that one half might then remain of the same property and estate. But if this should be held as extending to that portion already disposed of, then this very expectant estate has been already conveyed by this warranty deed, and the survivor's own share or half part is no longer liable to be defeated, because the event which might have terminated her fee could then never happen. All fees, *whether absolute or determinable*, continue to be *descendible inheritances*, until they are discharged from the determinable quality annexed to them. The survivor's own share becomes indeterminable by the death of the other, and continues as a descendible inheritance, which has also passed by this same warranty deed to the purchaser. (4 *Kent's Com.* 9, 10. 2 *Black. Com.* 173. 6 *Hill*, 605.) There is not in this will any devise over to third persons on the death of the first taker ; no future estate to any third person is limited thereon. The object of the testator was to give the whole property to the survivor, in case of the decease of either without issue, and intestate. The decease, thus, of either, determined every contingency ; the object being affected, it becomes a fee simple absolute in the survivor. The survivor must necessarily hold the fee divested of a contingency which thereafter could never occur. (See also 1 *Edw. Ch.* 178 ; 1 *R. S.* 723.)

III. Independent of the considerations, already presented, the statute, in express terms, turns these respective estates into a fee in favor of creditors and purchasers. The Revised Statute, on powers, section 81, thus declares, where a particular estate for life or years is granted, with such power, section 82 extends it to a case where the person to whom the power is given has no particular estate. Section 84 declares that a general and beneficial power *to devise the inheritance*, given to a tenant for life or years, is an absolute power of disposition, within the meaning and subject to the provisions

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of sections 81, 82 and 83. The power of disposition by will which these devisees possess, is a general beneficial power, as defined by sections 77 and 79. (7 *Paige*, 390, 490. *Lalor's Law of Real Property*, 208.)

Gaul & Esselstyne, for the defendant. I. It is manifest from the whole structure of the will, that the testator did not intend to give to his wife or daughter, during their lives, the absolute power of disposition of that portion of his property devised to them respectively. He did not intend to give to either a fee simple absolute, but only a determinable or qualified fee, with power of testamentary disposition. 1. He gives to his *wife* the power of testamentary disposition of the half devised to her. And says, *in terms*, "in case of her death, intestate, and without issue, then she shall be deemed to have held the same in trust *for and during her life only, and not absolutely or in fee.*" As to his daughter he says, "in case of the death of my said daughter, without issue and intestate, she shall be deemed to have held the property and estate hereinbefore given to her, in trust *for and during her life only, and not in fee or absolutely.*" How could the testator have more plainly expressed this intention? It is impossible to misunderstand it. There is no room for construction, nor for raising any devise by implication. 2. The attempt made by the plaintiff to argue that the testator *intended* to devise an absolute fee to his wife and daughter, from the fact that he devises "*whatever may remain*" of his property and estate, in case of the death of either intestate and without issue, to the survivor, must signally fail. It is absurd to attempt to raise *an absolute fee by implication*, where the testator in *express words* says that upon a certain contingency his wife and daughter *shall not* take a fee absolutely, but only a life estate, in which case he gives what remains, i. e. *the remainder of the estate, not any amount of property undisposed of*, to the survivor. Or the use of this word

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"*remain*" may have been intended to provide for the usual contingencies which attend the use of property. As to the *personal* estate, it was intended to provide for what was lost by unfortunate investment, or by misplaced confidence in or indulgence to creditors. And as to the *real* it was intended to have reference to its natural wear and decay, or to its diminution by fire or the elements. The testator intends to give to his devisees an ample and untrammelled *use* of his estate. Either of these constructions is consistent with the entire tenor of the will, whilst that contended for by the plaintiffs is utterly at variance therewith.

II. The conditions contained in the second clause of the will are not void for repugnance to the main devise contained in the first clause. They are not separate and independent provisions. The devise is not an absolute and unqualified devise of a fee in *one clause* of the will, and then an inconsistent and repugnant provision or devise in *another clause* of the will. It is a devise in express terms subject to the conditions contained in the second clause. Where the intention of the testator is so plain, and when the grammatical construction of the language employed, concurs with this manifest intention, it cannot be necessary to enter into any argument to convince the court that this intention must be carried out. The case of *Helmer v. Shoemaker*, (22 *Wend.* 137,) cited by the plaintiffs, was totally unlike the case at bar. In that case the testator devised all his real and personal estate to a devisee and gave him the power of unqualified disposition of the property devised, and afterwards devised to another so much *of the avails* of the property given to the first devisee as might remain at the decease of the first taker. The court held that the first devisee having a fee, the last devise was repugnant thereto and void. Again, the court will perceive that in the will under investigation in the case above cited, (22 *Wend.* 137,) the devise in remainder is not of what remains of the *property* itself, but "of all the *avails* of the property that *might remain*" at the death of the tes-

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tator's wife. Here there is by necessary implication a power of sale or of absolute disposition, as there can be no *avails* of property without a sale, and the devise being in terms of a fee absolute, and a right to sell the estate being also given, it was held by the court that the testator gave a fee to the first taker, and that the devise in remainder was therefore void.

But the Court of Appeals have settled this question, and held, that when after a devise or bequest "in language denoting an absolute gift of the whole estate in fee, there is in a subsequent part of the same will, a limitation over in the event of the first devisee dying under age and without issue, *the gifts are not repugnant to each other*, but the latter is a valid executory gift. In such cases the first legatee has only an usufructuary interest, while the continuance of his estate remains contingent." (*Norris exr. v. Beyea et al.*, 3 Kern. 273, 283. See also *Sweet v. Chass*, 2 Comst. 73; *Jarman on Wills*, 416, *et seq.*; 4 *Kent's Com.* 268; 6 *Cruise's Digest*, tit. 38, ch. 17, § 2; *Bacon's Abr. Devise*, 1; 1 *Fearne, Cont. Rem.* 399; *Trustees Theological Sem. of Auburn v. Kellogg*, 16 N. Y. Rep. 83.)

III. The interest of Mrs. Freeborn and Mrs. Vedder, each, in the half of the other, is such that it cannot be transferred to the defendant by the deed tendered. It is a contingent interest, which can only vest in possession of either in case the other die without issue and without having exercised the power of testamentary disposition given by the testator. In fact, is a mere *naked possibility*. (See *Jackson v. Waldron*, 13 Wend. 188, *per Tracy*, senator; see also *Edwards v. Varick*, 5 Denio, 664; *Pelletreau v. Jackson*, 11 Wend. 110; *Varick v. Edwards*, 1 Hoff. Ch. 382; *S. O.* 11 Paige, 289.) This was the unbroken current of decisions until the case of *Miller v. Emans*, (19 N. Y. Rep. 384,) upon which the plaintiffs, in this action, claim that the contingent interest of each plaintiff in the share devised to the other is assignable, and would pass to the defendant by the deed tendered. But

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this case is not in conflict with the decisions upon which the defendant relies to establish the converse of the above claim. A careful examination of the opinions of the several judges, will show a well defined difference between the cases. The court will perceive that solely for reasons of public policy, and without, in the slightest particular, affecting the principle of all the prior decisions upon which the defendant, in the case at bar, relies, and studiously avoiding any conflict therewith, the Court of Appeals, in *Miller v. Emans*, simply held "that any contingent right, however uncertain, might be released to a party already seised of a present estate in the premises in possession," and the court held nothing more.

IV. The statutes cited in the plaintiff's 3d point, do not apply to this case. 1 There is no beneficial power conferred in the case at bar. (*McDonough v. Loughlin*, 20 Barb. 238.) 2. The statute was designed simply as a shield to protect purchasers in good faith, after they had by deed acquired rights in real estate thus situated, and not as a sword in the hands of vendors to compel purchasers to take a doubtful or merely equitable title. (See § 81, above cited; *Jackson v. Edwards*, 22 Wend. 509; *Seymour v. DeLancey*, 1 Hopk. 436; *Morris v. Mowatt*, 2 Paige, 586.) 3. In any event, the estate was subject to any future estates limited thereon, and, therefore, could not be a fee simple absolute, which is the estate called for by the contract in suit. (See § 81, above cited.) 4. But this statute is not applicable to the case at bar, because no power to devise is given in the testator's will to a "tenant for years or for life." This is clear; plaintiffs are neither "tenants for years nor for life." They have such a qualified or determinable fee in the one half of the testator's estate, with power of testamentary disposition. (*Waldron v. Gianini*, 6 Hill, 605, 606.) This, under the statute, creates no absolute fee. This doctrine of transmigration of estates is not to be extended by implication. It must be confined to the strict letter of the statute. No such change is to be

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ciphered out by the astuteness of counsel, or the fictions of the law.

V. The power of testamentary disposition may be exercised by the testator's devisees, (the plaintiffs,) even although they had previously executed, and delivered to some person other than the devisee, under the power and conveyance of the real property, afterwards devised by them under the power, and the effect of its exercise would be to defeat any conveyance executed by them. (2 *Story's Eq. Jurisp.* § 1893.) This is clear, and will not be controverted, if we are right in the positions assumed by us in point 4. The devisees, under the power, would not be estopped or affected by any previous conveyance of the plaintiffs, or either of them. It is a power to devise, not the determinable fee given to each by the testator's will, but the fee simple absolute of the testator, James Outwater. The devisees, under the power, would not take *the estate devised to the plaintiffs* by the will under consideration, but *the estate of the testator himself*. Such estate would pass to the devisees under the power, not *from* the plaintiffs, but *through* them; they being merely a conduit. It follows, then, as a necessary conclusion from the last proposition above stated, that the deed produced by the plaintiffs in this suit will not convey to the defendant a fee simple absolute, in the real estate therein mentioned, but simply an estate that may be defeated at the will of the plaintiffs, by the exercise of the power of testamentary disposition given them by the testator's will. The contrary of this proposition is not, and will not be, claimed by the plaintiffs. They rest their cause entirely upon the supposed effect of the statute last above cited, which, it is clear to us for reasons above stated, does not in the slightest degree affect or apply to the case at bar.

By the Court, GILBERT, J. It is against the rule of courts of equity, to compel a purchaser, on a bill for a specific performance, to take a doubtful title; in other words, to buy a

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law suit. We have, therefore, looked into the title, which these plaintiffs tendered to the defendant, with scrutiny ; and, upon full consideration, we are of the opinion that it is free from legal objection.

James Outwater devised to each of the plaintiffs, one equal half part of his estate, subject to these restrictions, namely, that each of the devisees is vested with a power of testamentary disposition, unaffected by any trust or limitation ; but in case of the death, *intestate*, and *without issue*, of either devisee, *whatever may remain* of the same property is devised to the survivor.

Both devisees have united in a conveyance to the defendant, with covenant of warranty. This, certainly, would pass all the title of the plaintiffs, either vested or contingent ; for the plaintiffs are "capable of holding lands," and may alien any estate or *interest* therein of which they are seised, or to which they are entitled. (1 *R. S.* 719, § 10. *Albany Ins. Co. v. Bay*, 4 *Comst.* 19. *Dickerman v. Abrahams*, 21 *Barb.* 551.) And by the statute, (1 *R. S.* 725, § 35,) expectant estates are alienable, in the same manner as estates in possession.

The covenant of warranty would operate as an estoppel, against the plaintiffs asserting any title, in contravention of their conveyance.

Can the title thus conveyed be defeated by an execution of the power of testamentary disposition contained in the will ? This power is general and beneficial, because it authorizes the alienation by will, to any alienee whatever, and no person, other than the grantee, has, by the terms of its creation, any interest in its execution. (1 *R. S.* 732, §§ 77, 79.)

The will also vests an absolute power of disposition, in each devisee, because the limitation over embraces only such part of the property as shall remain undisposed of at the death of the devisee who shall first die. No formal set of words is necessary to create a power. It is sufficient if the intention to create it clearly appears, and instruments are

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construed liberally, in furtherance of that intention. (4 *Kent's Com.* 319.)

Each devisee may, therefore, in her lifetime dispose of the entire fee of the estate devised to her, for her own benefit. The language of the will clearly manifests such intention of the devisor, even if the devisees are not, by means of the express power, enabled in their *lifetime*, to dispose of the entire fee for their own benefit. (*Id.* § 85. *Jackson v. Edwards*, 7 *Paige*, 401.) By section 83, of the same statute, it is provided that "when an absolute power of disposition, not accompanied by any trust, shall be given to any person, to whom no particular estate is limited, such person shall take a fee, subject to any future estate that may be limited thereon, but absolute as to creditors or purchasers." We think there is no limitation of any particular estate, to either of these plaintiffs, contained in the will. It is only in case one of them shall die, *intestate* and *without issue*, that *what shall remain* of the estate given to her shall, for the benefit or behoof of the survivor, *be deemed* to have been held for life only. But, if a tenancy for life was created, then, by the express language of the statute, each devisee possesses an absolute power of disposition. (*Id.* § 84.)

The statutes cited have accomplished that which the legislature intended, namely, the making of the power of disposition equivalent to actual ownership. (*Rev. Notes to art. 3, ch. 1, part 2.*) The power having been granted by the will, did not take effect until the death of the donor. It is manifest, therefore, that the estate of the plaintiffs is no longer subject to the contingency that any future estate may be limited thereon. Any execution of the power of testamentary disposition, made after the conveyance to the defendant, could, therefore, have no manner of effect upon the estate thereby conveyed.

The defendant's counsel contends that the estate devised to the plaintiffs is a determinable or qualified fee; and that the interest, which each devisee takes in the share of the

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other, in case of survivorship, is a naked possibility only. Conceding that this is a proper denomination of estates and interests in lands, under our statutes, still the whole estate of the devisor was vested in the devisees, and will go to the defendant, by the conveyance of the plaintiffs. (1 R. S. 722, §§ 2, 7, 8, 9, 13, 35. *Lawrence v. Bayard*, 7 Paige, 76.) In this case the chancellor says that by the term, "expectant estates," the legislature intended to include every present right or interest, either vested or contingent, which may, by possibility, vest in possession at a future day. The mooted question, whether a mere possibility, coupled with an interest, is capable of being conveyed, is, therefore, forever put at rest in this state.

We have shown that the estate so conveyed cannot be defeated or divested by an execution of the power of testamentary disposition. Without going into any refinement of legal learning, therefore, we are of the opinion that, upon the plain language of the statute, the title offered to the defendant is good, and that he is, in equity, bound to accept it.

The court below directed judgment subject to the opinion of the court at general term. This was a mistrial; and the case must be sent back, unless the parties consent to a modification of the decision, by striking out the portion of it after the word "costs," and a further consent to the entry of judgment upon the decision as amended, and an appeal therefrom, *nunc pro tunc*; in which case judgment of affirmance, with costs, may be entered.

[KINGS GENERAL TERM, February 11, 1867. *Lott, J. F. Barnard*, and *Gilbert*, Justices.]

PULLMAN *vs.* THE MAYOR, ALDERMAN AND COMMONALTY
OF THE CITY OF NEW YORK.

The corporation of the city of New York are not authorized, since the passage of the act of the legislature, of May 4, 1866, (*Laws of 1866, ch. 876*), to contract for lighting the city with gas, for a period beyond one year, nor for an amount larger than the sum appropriated by that act to the specific purpose of lighting the streets for the year 1866.

A contract on the part of the corporation which is to extend over a period of twenty years, though void, would, if made, confer rights of property, and the fact of its having been entered into might present embarrassment in the way of its being subsequently set aside. The preventive remedy by injunction may therefore be adopted, under such circumstances.

THIS action was brought by the plaintiff, a member of the common council of the city of New York, against the mayor and common council of said city, and Charles G. Cornell, street commissioner, to restrain them from proceeding under a resolution of the said common council, passed July 10, 1866, in the following words, viz :

"*Resolved*, That the street commissioner be and he is hereby authorized and directed to make a contract for lighting all the streets, avenues, roads, squares, parks, public buildings, and places of the city of New York, with coal gas, such contract to be founded on sealed bids or proposals, and to be made with the company giving adequate security, to be approved by the comptroller in the manner provided by law, which shall agree to do the same for the lowest price for each lamp or light per annum, or quantity, when it can be measured according to existing regulations, and affording to such company sufficient time to lay their mains and introduce gas as required by the contract. The provisions of the contract last made and executed with the Manhattan Gas Company, as far as practicable, shall be embodied in the contract made in pursuance of this resolution, and the term during which the same is to continue shall be for the same number of years as that contract. Any resolution or ordinance inconsistent with this resolution is hereby repealed."

An affidavit setting forth the following facts was present-

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ed by the plaintiff, to Justice BARNARD, viz: That the term for which the contract contemplated by the resolution would be made would be twenty years (that being the term of the Manhattan Gas Company contract;) that by the act of May 4, 1866, (*Laws of 1866, ch. 876,*) the legislature appropriated \$763,745 to pay for lighting the public lamps of the city of New York for that year; that no other sum was ever appropriated for such lighting, for a greater period; that by the 9th and 10th sections of the same act, the common council were prohibited from making a contract for such lighting, for a longer period than one year; that the passing of said resolution was a violation of law and their duties, by said common council, and the making of the contract so directed to be made would be illegal, and any such contract, so made, would be void; that the making of a contract for twenty years, at a price to be fixed now, would deprive the city of any benefit flowing from competition in the gas business and from a fall of price; that it was designed to make such contract for the price of \$50 or more for each public lamp, which would amount to about \$1,200,000 per year, which is wasteful and extravagant; that the corporation of New York is a *limited* corporation, restricted by several charters and acts of the legislature, among them the act aforesaid; that the common council of said city is, and the members thereof are, *trustees* of the property of such corporation, and that the plaintiff is a member of said common council, and is a *co-trustee* with the other members of said common council, and that he and they are bound in law and equity to protect and preserve the said property to the people of the said city, who are the beneficiaries of said trust; that the plaintiff protested and voted against said resolution, before it was adopted by the common council, for the above reasons; that the said contract was not yet made, but the street commissioner was about to advertise for proposals; that the payments under such contract would be made from the taxes levied, and other of such trust property.

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The plaintiff prayed the equitable intervention of the court for the protection of the trust property from the contemplated waste by the trustees, the common council.

Upon this affidavit, Justice BARNARD granted a preliminary injunction, which was served on a majority of the members of the common council, on the mayor, and on the street commissioner.

The plaintiff subsequently moved, before the same justice, for an order making the injunction perpetual. This was opposed by the defendants, who read an affidavit made by Wm. M. Tweed, deputy and acting street commissioner, stating that there were no contracts existing for the lighting of the city with gas; that the corporation was liable for such charges as the gas companies saw fit to impose; and that they were obliged to pay a much larger sum than if a contract were made therefor.

Charles Tracy and Joseph F. Daly, for the plaintiff.

Richard O'Gorman, for the defendants.

GEO. G. BARNARD, J. The act of 1866, (*Laws of 1866, vol. 2, p. 2056,*) authorizes the supervisors of the county of New York, to raise by taxation certain sums, for certain specific objects, and among others, the sum of seven hundred sixty three thousand, seven hundred and forty-five dollars, for lamps and gas. It then provides as follows: "The said several sums shall be applied only to the objects and purposes for which the same are hereby appropriated, and neither said corporation, nor any member or officer thereof, nor any department, or head of department, or other official, shall incur any liability for any of the objects and purposes specified, to an amount beyond the sums so appropriated." And again: "The mayor, aldermen, and commonalty of the city of New York shall not be liable upon any contract made, or expenditure authorized, or liability incurred by any board, depart-

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ment, or officer of said corporation, for any object or purpose which is not expressly authorized by this act, nor for any contract made, or expenditure authorized, or liability incurred by any board, department, or officer of said corporation, for any object or purpose named in this act, beyond the amount appropriated to such specific object or purpose."

I do not understand it to be claimed, that these provisions of the act are unconstitutional. There are then but two questions, viz :

1. Does a proper construction of the act prohibit the defendants from making the contract in question ?

2. If it does, are the consequences of making such contract sufficient to call for a preventive remedy ?

That the first question requires an affirmative answer, seems to be almost too clear to admit of argument. If the appropriation is made for the sole *object and purpose* of procuring the lighting of streets for *one year* only, then, as the proposed contract in question extends beyond one year, and contemplates binding the corporation to take gas for more than one year, and imposing on it a liability to pay for the use of such gas for those other years, it is prohibited under the clause declaring that the corporation "shall not be liable upon any contract made, or expenditure authorized, or liability incurred * * * * for any object or purpose not expressly authorized by this act."

If the appropriation is to be regarded as not limited to procuring gas for one year only, but is intended to authorize the procuring of so much gas as can be procured for that amount, without any limit as to the time within which it shall be supplied, then, as this proposed contract contemplates rendering the corporation liable for a much larger sum than that appropriated, it is prohibited under the clause declaring that the corporation "shall not be liable for any contract made, or expenditure authorized, or liability incurred * * * * for any object or purpose named in this act,

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beyond the amount appropriated to such specific object or purpose."

It may be that the attention of the legislature was not called to the consideration of the question whether it might not be necessary to make a contract for the supply of gas extending over a term of years, and that if their attention had been called to the consideration of such question, provision would have been made to meet the case. But if no provision was made to meet the case, because attention was not called to the subject, it becomes simply a *casus omissus*, which the court is not bound to suffer. On the other hand, it may be that the attention of the legislature was called to the subject, and that they determined there was no necessity for a contract for longer than a year.

Whatever consequences ensue from this want of power to make a contract for a term of years, must be ascribed to the legislature. The possibility of such consequences does not authorize either the common council to transcend their powers, or this court to sanction them in so doing.

With reference to the second question, viz : are the consequences to flow from the making of this unlawful contract sufficient to call for a preventive remedy? It is urged that if the contracts when executed will be void, no damage can arise from their execution, and consequently an injunction should not issue. This contract if made, confers rights of property, and is to last for twenty years, and the fact of its having been granted, might present embarrassments in the way of its being subsequently set aside. In *The People v. Mayor &c. of New York*, (32 Barb. 102,) it was held that under such circumstances, the preventive remedy by way of injunction, was not only lawful, but was the best and safest remedy which could be adopted.

Here the parties defendants are trustees ; their co-trustee seeks to enjoin them against committing a breach of their trust, and they come in and say, although the court shall decide that the act which we are about to do would be a

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breach of our trust, yet the court should permit us to go on and do it. Under such circumstances, even the possibility of inconvenience arising from such breach, will be sufficient to call on the court to prevent its commission.

I have not considered the question whether it is more expedient to have gas furnished from year to year, than upon a contract for a term of years; nor whether the terms of the proposed contract are for the best interests of the city; as, in the view which I have taken of this case, these matters are not material to its decision.

The injunction must be continued.

[NEW YORK SPECIAL TERM, November 5, 1866. Geo. G. Barnard, Justice.]

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A summons, issued by an attorney, with his name *printed* at the end thereof, is "subscribed" by him, within the requirements of the Code.

It is allowable, on application for orders of publication, and of a like nature, to read affidavits made and entitled in another action.

In an action for the foreclosure of a mortgage, the non-residence of the defendants need not be shown, to entitle the plaintiff to an order for publication. It is sufficient, to show that the defendants cannot, after due diligence, be found within this state so as to enable the plaintiff to serve the summons upon them.

It is to be presumed, from the fact of making an order for publication, that the affidavits recited therein afforded satisfactory evidence to the court of the requisite facts, as to the plaintiff's inability to serve the summons on the defendants, within this state. Hence, the omission so to state in the order, does not affect its validity.

An order directed to be served by mail need not be *filed* before the papers are mailed. The previous deposit of the papers is, at most, an irregularity, that can be remedied at any time, by filing the order *nunc pro tunc*.

After an answer has been put in, for an infant, by his guardian *ad litem*, and judgment has been entered, the regularity of the guardian's appointment cannot be questioned.

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THIS was an application by a purchaser of mortgaged premises, at a sale under a decree of foreclosure, to be discharged from his purchase.

Wm. H. Arnoux, for the motion.

Barnard, Rice & Burnett, contra.

LOTT, J. This is an application on behalf of a purchaser of mortgaged premises sold under a judgment of foreclosure and sale, to be discharged from his purchase, on the following grounds :

1. That the summons is not subscribed by the plaintiff, or his attorney.
2. That the affidavits on which the order for publication was granted, is insufficient.
3. That no copy of the order appointing a guardian *ad litem* of the non-resident infant defendant was served, according to the terms of the order.

These grounds will be examined in the order they are above stated.

I. The first objection is based on the fact, appearing by the judgment roll, that the names of the plaintiff's attorneys are *printed* at the end of the summons forming part of the roll. This, it is claimed, is not a compliance with the requirements of the Code, which provides that "the summons shall be subscribed by the plaintiff, or his attorney," and shall require the defendant to "serve a copy of his answer on the person whose name is subscribed to the summons."

It then becomes necessary to determine whether a summons, issued by an attorney, with his name printed at the end thereof, is subscribed by him, within the meaning of that provision.

Two cases were referred to, on the argument of the motion, in which the question has been considered ; and I have been unable, after a careful examination, to find any other ; and

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in those the learned justices who examined it arrived at different conclusions. The first was the case of *The Farmers' Loan and Trust Company v. Dickson*, reported in 9 Abb. Pr. 61, and also in 17 How. Pr. 477, which was decided by Justice INGRAHAM, at special term, in the first district. A motion was there made by a purchaser, to be relieved from a sale, on the ground, among others, that the name of the attorney was printed, at the end of the summons; and the learned justice, after considering two other objections that were made to the proceedings, and stating that one of them could be remedied by filing an affidavit of the service of the summons on one of the defendants, *nunc pro tunc*, says, in relation to that now under consideration: "The summons should have been signed by the plaintiff, or his attorney, (§ 128,) and the printed name of the attorney was a nullity. As the copy served was correct, the plaintiff might also file a copy properly signed, *nunc pro tunc*." The other case was that of *The Mutual Life Ins. Co. v. Ross*, reported in a note, at p. 260, of 10 Abb. Pr., in which the defendant moved to set aside the summons served on him, on the ground that the name of the plaintiff's attorney was printed at the end thereof. On the argument of that motion, the decision of Judge INGRAHAM was referred to and commented on by counsel, and the report of the case closes with saying that "E. D. SMITH, J. denied the motion, with costs, upon the ground that a printed subscription is a substantial compliance with the statute, and the objection was technical, and if there was a defect, it was immaterial."

Neither of these learned justices appears to have assigned the reasons for the conclusion at which he arrived. I am, therefore, obliged to examine the question embarrassed by their difference of opinion, without the benefit of the aid which those reasons would have afforded. In doing this, it may be useful to ascertain the scope and extent of the decision of Justice INGRAHAM. He treats the words "subscribe" and "sign," as synonymous; and when he says that the summons

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should have been signed by the plaintiff, or his attorney, and that the printed name of the attorney was a nullity, he clearly indicates that such signature should have been in the proper hand writing of such attorney. If this was his meaning, he was, in my opinion, mistaken. Previous to the adoption of the Code, it was provided by the Revised Statutes, (2 R. S. 278, § 9,) that all writs and process issued out of any court of record should, before the delivery of the same to any officer to be executed "be subscribed or indorsed with the name of the attorney, solicitor or other person," by whom the same was issued; and yet, in the same title, at page 286, section 70, it is declared that "if any attorney, or solicitor, shall knowingly permit any person, not being his general law partner, or a clerk in his office, to sue out any process, or to prosecute or defend any action in his name, such attorney, or solicitor, and every person who shall so use the name of any attorney, or soltcitor, shall severally forfeit to the person against whom such process shall have been sued out, or such action prosecuted or defended, the sum of fifty dollars."

This last provision is still in force, and by exempting the general law partner, and the clerks of an attorney, from the penalty imposed for using his name in issuing process, and prosecuting and defending actions, it is clearly implied that it may be so used by them, by his permission and authority.

Although the Revised Statutes provide that the process "shall be subscribed or indorsed *with the name* of the attorney, solicitor or other person," issuing the same, and the requirement of the Code is, that the summons shall be subscribed by the plaintiff or his attorney, the difference in the phraseology does not, in my opinion, justify the conclusion that a difference in practice was intended.

It will be observed that the use, by a clerk, of the attorney's name, appears to be authorized under the provision above referred to, in actions in which the attorney himself has no interest or connection; and it has, I believe, been the general

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practice of attorneys to allow a clerk in their office to sign their name to process issued by them. The authority given to the clerk by the attorney, in such a case, makes it his act, and he is responsible therefor to the court and the party proceeded against, and I have found no case where the practice has been called in question. There certainly appears no reason, in principle, why it should not be permitted. There are many instruments which the law requires to be subscribed or signed by the party to be bound thereby, and yet a subscription, or signature, by him personally, is not necessary. Thus, the statute regulating the execution of wills, after expressly providing that every will "shall be subscribed by the testator," recognizes a signing of his name by another person as a compliance with that provision, by a subsequent requirement that "every person who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to the will;" and it was distinctly decided in *Robins v. Coryell*, (27 Barb. 556,) after a full and careful examination of the question, that the writing of the testator's name to a will, by another person, in his presence and by his direction, is a subscription by him, within the meaning of that statute; and an opinion to the same effect, is expressed by Chancellor Walworth, in *Chaffee v. Baptist Missionary Convention*, (10 Paige, 91,) and by Hand, J. in *Butler v. Benson*, (1 Barb. 533.) So the statute of frauds, requiring certain agreements to be in writing, and to be signed or subscribed by the party to be charged therewith, is satisfied by the signature or subscription of the name of such party thereto, by another person duly authorized to make it.

If such is the rule applicable to statutes in the case of wills and other written instruments requiring the subscription of parties, I am unable to discover any reason why a different construction should be given to that in relation to legal process.

The views thus presented lead us to the conclusion that a subscription of the name of an attorney issuing a summons

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is not required to be made by himself personally, but that it may be made by another with his authority ; and assuming this to be correct, it seems to follow that his name may be printed, as a substitute for his written signature.

A party may, in the ordinary transactions of business, become bound by any mark or designation he thinks proper to adopt and use, for his name. It was decided, in *Brown v. The Butchers and Drovers' Bank*, (6 Hill, 443,) that Brown was liable as an indorser, by an indorsement of the figures, "1, 2, 8," made by him in lead pencil, no name being written thereon ; it also appearing that he could write. In that case the court instructed the jury that if they believed the figures were made by Brown, as a substitute for his proper name, intending thereby to bind himself as indorser, he was liable ; and this ruling was sustained on review. So it has been held by the general term in this district, in the case of *Mechanics' Bank v. Sullivan*, heard in December, 1862, (but not reported, I believe,) that a notice of the protest of a note, sent to an indorser by a notary with his name printed at the end of it, was sufficient.

It is a common practice for a person who is unable to write his name to make his mark ; and the making of such mark is held to be a good signing or subscription, within the requirements of the law, by a testator, to a will. (*Baker v. Dening*, 8 Ad. & Ellis, 94. *Jackson v. Van Dusen*, 5 John. 144. *Chaffee v. The Baptist Miss. Convention*, 10 Paige, 85.)

In the case of *Baker v. Dening*, above cited, the court refused to permit an inquiry whether the person making his mark could write or not, adopting the rule that the requisite of signing by the statute of frauds was satisfied by the mark of the devisor, irrespective of his ability to write.

Under our statute, it is required that a subscribing witness "shall sign his name as a witness ;" and it was claimed in the case of *Morris v. Kniffin*, (37 Barb. 336,) among other things, "that a marksman cannot be, and is not, a subscribing witness within the meaning of the statute ;" but the

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Supreme Court, at general term in the third district, (Justice HOGEBROOM giving the opinion,) held that where a witness makes his mark, instead of writing his name, it is still a signing of his name, or subscription, within the meaning of the statute ; and he refers, with approbation, to the decision by Surrogate Bradford, in the case of *Meehan v. Rourke*, (2 *Bradf.* 385,) where he discusses the question, and concludes that such a mode of attestation is a sufficient compliance with the statute. (See also *Jackson v. Van Dusen*, *supra*.)

So it was held by the lord chancellor, in England, in *Harrison v. Harrison*, (8 *Ves.* 185,) that a will was sufficiently executed where one witness only subscribed his name, and the two others attested it "by setting their marks respectively." And in that case it was shown that there had been a great many cases where it had been held to be sufficient for a "marksman" to be a witness. (See also *Addy v. Griz*, *Id.* 504.)

It appears also to be settled that where a person is in the habit of using documents with his name printed thereon, this will be his signature, within the meaning of the statute of frauds. (2 *Parsons on Contracts*, 289. See also *Sanderson v. Jackson*, 2 *Bos. & P.* 238 ; *Schneider v. Morris*, 2 *M. & S.* 286.) In the last case, Le Blanc, J. said : "Suppose the defendant had stamped the bill of parcels with his own name, would not that have been sufficient ? Such a stamping, as it seems to me, if required to be done by the party himself, or by his authority, would afford the same protection as signing."

There are also many cases where printing is substituted for writing, in instruments which under our statute are required to be in writing. It is the general practice for deeds, or conveyances of real estate, and bills of sale of personal property, to be printed ; and it is very common to use printed agreements for the sale of both real and personal estate, and their validity is conceded ; yet the statute declares that all

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conveyances of land, and all contracts for the sale of lands, or a note or memorandum thereof, shall be in *writing*, subscribed by the party by whom the conveyance or sale is made, and also makes it necessary for a note or memorandum of every contract for a sale of goods, when the price thereof is fifty dollars or more, to be *in writing*, except in cases of part payment of the purchase money, or delivery of part of the goods. (*See* 2 R. S. 134, § 6 ; *Id.* 135, § 8 ; *Id.* 136, § 3.)

Assuming, then that such instruments, when printed, are "*in writing*," within the requirements of these provisions of the statute, is there any good reason why printing an attorney's name may not be permitted, as and for his signature to a summons or other legal process ? In this connection I will refer to the fact that the Code provides for the service of a summons on a defendant by delivering a copy thereof without the necessity of showing him the original, (§ 134 ;) and also authorizes a copy to be inserted in the judgment roll. (§ 281.) This appears to me a material fact in determining the question now under consideration. It is by the service of the summons that the action is commenced, and jurisdiction over the party is acquired ; and if the service of a printed copy (for there is nothing to prohibit such a copy,) is sufficient for that purpose, and such a copy may properly form a part of the judgment roll, there is no valid reason for requiring the paper spoken of, and denominated *the* summons (but which may never be filed, but be forever kept in the pigeon holes of an attorney's desk) to be subscribed with the *written* name of the attorney, and for holding a printed subscription to be a nullity.

The *name* of the attorney issuing the summons is as effectually disclosed when it is printed, as if it were written ; and his responsibility to the defendant and to the court, in either case, is the same. It would be necessary in any proceeding against him, to show that he was in fact the attorney issuing the process ; and although there might be more difficulty in making that proof when his name was printed than there

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would be if it were written by himself, or by another with his authority, that difficulty exists in all cases of agency, and is not sufficient, on the ground of public policy, or of any inconvenience to suitors, to require a different or a more stringent rule in case of legal process than in any other case affecting the private rights of individuals.

The different considerations above presented, lead me to the conclusion that the summons in this case was subscribed, within the requirements of the Code, and that the first ground of objection to the proceedings is, consequently, not well taken.

II. The second objection involves the sufficiency of the affidavit on which the order of publication was granted.

It appears by the judgment roll, that the order purports to have been founded on an affidavit, entitled in this action, made by David B. Burnett, one of the plaintiffs' attorneys, and on another made by Jeremiah Johnson, Jr. in a different action, against the defendants in this, commenced by E. Burtis Brainard as plaintiff. The affidavit of Mr. Burnett, after setting forth the nature of the action, and showing that all of the defendants proceeded against as absentees, are proper parties, states "that the said defendants are, as deponent is informed and believes, non-residents of this state, and are now absent therefrom, and cannot with due diligence be served with summons herein ; that as deponent is informed, the defendants, Jesse A. Heydrick, Elizabeth Heydrick, and ——— Heydrick, reside at Franklin, in the state of Pennsylvania, and that the defendants Charles H. Heydrick, and Anne his wife, reside at Utica, in the said state of Pennsylvania." This was verified on the 13th day of May, 1866. The affidavit of Mr. Johnson was made on the 7th day of the said month of May. He stated positively, as a fact, that the said defendants, at that time, were non-residents of this state, and resided at the place mentioned in the affidavit of Mr. Burnett. It is claimed on behalf of the purchaser, that Mr. Johnson's affidavit, being entitled in a different suit,

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could not be used in this. In that, I think he is mistaken. The Code requires that it shall appear "by affidavit to the satisfaction of the court or a judge granting the order, that the person on whom the service of the summons is to be made, cannot, after due dilligence, be found in this state ;" and I see no good reason why that may not be shown by an affidavit properly made, and forming a part of the records of the state, although not in the particular action in which the order is asked. That may, in many cases, afford more satisfactory evidence of the fact, than any proof that could otherwise be obtained. It appears to be the practice, in England, to read affidavits in one suit, that have been used in another, on certain applications ; (*see Langston v. Wetherell*, 14 *Mees. & W.* 104 ;) and I am of opinion it is allowable on an application for orders of publication, and of a like nature. The objection to it appears to be a matter of form, merely, and not of substance.

I shall therefore hold that the affidavit of Mr. Johnson was properly before the court, and that it, with the facts stated by Mr. Burnett, authorized the order. In so holding, I agree with the counsel of the purchaser, that the allegation made by Mr. Burnett, on information and belief merely, is not evidence, but the absence of the defendants from the state is, as I understand his affidavit, positively stated by him ; and that is a fact which affords at least some proof that they could not be served therein, with the summons. This case being an action for the foreclosure of a mortgage, the non-residence of the defendants was not necessary to be shown. It was sufficient to establish the fact satisfactorily, that they could not, after due diligence, be found within this state, so as to enable the plaintiff to effect the service of the summons on them, and that the case came, (as it clearly did,) within the fourth subdivision of section 135, which is distinct from the third subdivision, having reference to non-residents of this state. It is to be presumed, from the fact of making the order, that the

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affidavits recited therein, afforded satisfactory evidence to the court of those requisites, and the omission so to state, in the order, does not affect its validity.

I am therefore of opinion that the second ground of objection to the proceedings is not well founded.

III. The third objection is based on the fact that a copy of the order *nisi* appointing the guardian *ad litem* of the non-resident infant defendant, was deposited in the post office two days before the order and the affidavits on which it was founded were filed. It appears, however, that the order was made on the day of the deposit; and the omission to file it until a subsequent day, does not invalidate the proceedings. According to our present practice, an order and the affidavits on which it was founded, must, in many cases, be taken to a distant county, and it is often impossible to file them in the proper office on the same day the order is made. That, however, is effectual, when filed, from the time it is granted. The previous deposit is, at most, an irregularity that can be remedied at any time, by filing the order *nunc pro tunc*. This, however, is not necessary. No guardian was ever appointed on the application of the infant, or of any relation on his behalf, and the original order *nisi* became effectual. The original appointment of the guardian, has, moreover, been confirmed by the court. An answer was put in by him for the infant, and judgment has been entered. Under such a state of facts, the regularity of the appointment of the guardian, cannot now be questioned. (*Rogers v. McLean*, 31 How. Pr. 279.)

It follows that the last ground on which the purchaser asks relief, is not available for that purpose.

I am thus, after a full consideration, brought to the conclusion that the application of the purchaser must be denied.

[KINGS SPECIAL TERM, June 25, 1866. Lott, Justice.]

SCOTT vs. DUNCOMBE, impleaded &c.

The defendant in an action brought by a receiver as such, put in a demurrer, which, on motion, was stricken out as frivolous; and she, on applying to the court for leave to answer, was allowed to do so, provided that she executed a bond, with sureties, conditioned that if the plaintiff should finally recover judgment against her she would obey such judgment and would pay the plaintiff the sum thereby directed to be paid. Such bond was thereupon executed. In an action thereon; *it was held* that the execution of such bond to the plaintiff *as receiver*, must be deemed an admission by the obligors, not only that the plaintiff had been duly appointed receiver, but also that the receiver was authorized to bring the action mentioned in the condition of the bond.

Held, also, that it was not necessary for the plaintiff, on the trial, to show the judgment recovered, and execution issued and returned unsatisfied; especially as the defendant had not set up in his answer that the plaintiff had not been regularly appointed receiver, and made no attempt to show that he had not been, on the trial.

Held, further, that it was not necessary for the plaintiff to introduce even the original order appointing him receiver, or his bond as receiver.

The surety in a bond given to a plaintiff suing as receiver, conditioned to pay any judgment the plaintiff may recover against the principal obligor, in that action, is liable for the amount of judgments recovered in cases wherein the obligee is appointed receiver subsequent to the execution of such bond, as well as for the amount of those recovered previously.

APPEAL by the defendant, Alfred H. Duncombe, from a judgment entered after a trial before a justice of the court, without a jury, a jury having been waived by consent. The action is upon a bond executed pursuant to an order of the court. On the 4th of October, 1861, the plaintiff herein, as receiver appointed in supplementary proceedings of the property of Francis E. Smith, a judgment debtor, commenced an action in this court against Francis E. Smith, Claiborne Ferris, Francis Ferris and Caroline C. Hatch, to set aside certain fraudulent transfers of property made by said Francis E. Smith, at various times, to them severally. The defendant Caroline C. Hatch, put in a demurrer, which, on motion, was stricken out as frivolous; and she, on applying to the court for leave to put in an answer, was allowed to do so, provided that she executed a bond with two sure-

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ties, to the effect that if the plaintiff finally recovered judgment against her she would obey such judgment, and would pay the plaintiff the sum and all costs thereby directed to be paid. The bond was accordingly executed, a copy of which is set forth in the complaint. The plaintiff recovered judgment in said action against the defendant Hatch, for \$11,003.63. The plaintiff also recovered judgment in the same action against the defendant Claiborne Ferris for the value of certain property which he fraudulently obtained from the judgment debtor, Francis E. Smith, for \$2840.50. The case contains only so much of the evidence as to raise the exceptions taken by the defendant Duncombe, who alone appealed. ,

The exceptions taken by the defendant were as follows :

The defendant, Duncombe, objected to the judgment recovered by the plaintiff in the action in which the said Caroline C. Hatch, and others, were the defendants, on the ground that the same provided for the payment of other judgments than those on account of which the plaintiff was appointed receiver, and in reference to which said action was commenced without notice to the defendant, Duncombe, and in reference to which the defendant, Duncombe, had not become surety ; and also that the said plaintiff had not been appointed receiver in reference to said judgments until after the execution of the bond set forth in the complaint ; which objection was overruled by the court ; to which decision the counsel for the defendant, Duncombe, excepted. The defendant also objected to the order of the court of common pleas granting leave to the plaintiff to commence this action, on the ground that it was granted without any notice to such defendant. The objection was overruled, and the defendant excepted. The defendant also objected to the order of Judge Hilton appointing the plaintiff receiver, on the ground that it was not shown to be an order made in the case, over which the court of common pleas had jurisdiction, either of the persons, or the subject matter ; which objection was overruled

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by the court, and to which decision the counsel for the defendant, Duncombe, excepted.

The counsel for the defendant, Duncombe, moved for a dismissal of the complaint, on the following grounds :

1. That the original affidavit and order, (if any there was,) from the court of common pleas upon which the order for a receiver was based, has not been introduced, and no jurisdiction is shown in the court of common pleas, or a judge thereof, to make an order appointing a receiver.

2. That the plaintiff has not shown any judgment, or judgments, which would form the basis of any order supplemental to the execution, prior to the execution of this bond.

3. That by the judgment offered in evidence, there has been created a greater obligation than existed at the time of the execution of the bond, to the prejudice of the bond.

4. The bond is not given according to the order made in the action. It is not approved by a justice of the Supreme Court, and has never been accepted by the court.

5. No demand has been made upon the defendant, Mrs. Hatch, nor upon the sureties.

The court denied the motion, to which decision on each ground before stated, the counsel for the defendant, Duncombe, severally excepted.

The counsel for the defendant, Duncombe, proceeded to maintain the issue on his part, and thereupon the counsel for the plaintiff admitted that the said judgment against Claiborne Ferris was compromised for the sum of \$2000, and the money received by him as attorney for the said receiver prior to the commencement of this action, under an order of the court.

The counsel for the defendant, Duncombe, then rested the case on his part. No further testimony being offered on either side, the counsel for the defendant, Duncombe, urged upon the court two propositions of law, on the facts proved.

1. That the defendant, Duncombe, with his co-surety had executed the bond in this action, with special reference to the

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amount of the two judgments in favor of DeGoer & Riffard, set forth in the complaint, and in which the plaintiff was appointed receiver, and as such for the benefit of said judgments had commenced the action against Caroline C. Hatch, Claiborne Ferris, and others; and that the amount of recovery on said bond should be limited to the extent of the said judgments and interest, and the costs in said action, and should not be held for the benefit of the judgments in which proceedings supplementary to execution were subsequently taken, and the plaintiff appointed receiver subsequently to the commencement of said action. 2. That by the terms of said judgment against Caroline C. Hatch and Claiborne Ferris, and others, it was ordered that the amount collected from the said Claiborne Ferris, should be credited on account of the said judgment against Caroline C. Hatch, and that the said sum of \$2000 paid by said Ferris was, in effect, a payment by the said Caroline C. Hatch, and in the absence of any special application, enured to the benefit and relief of the defendant, Dunscombe, and his co-surety in said bond, to the extent of said amount, on account of any liability on said bond, if any.

The action was submitted to the court, who subsequently made a decision containing the findings of fact and conclusions of law, as follows :

1st. That the plaintiff was duly appointed and qualified as receiver at the time, and in manner and form and in proceedings on judgments, as alleged in the complaint.

2d. That on or about the 4th of October, 1861, the plaintiff, as such receiver, commenced and continued an action, in this court, against Claiborne Ferris, Francis Ferris, Caroline C. Hatch and Francis E. Smith, and on the 3d day of November, 1864, judgment was rendered, in said action, in favor of said plaintiff against all the defendants therein, and against the said Claiborne Ferris for the sum of \$2480.50, and against the said Caroline C. Hatch for the sum of \$11,003.63. That by the terms of the said judgment, it was ordered that the

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amount collected from the said Claiborne Ferris, should be credited on account of the judgments against the said Caroline C. Hatch. Said judgment roll therein was filed in the office of the clerk of the city and county of New York, and the same still remains of record, and the said judgment, and every part thereof, remains due, and owing, from the said Caroline C. Hatch, to the plaintiff.

3d. That on the 29th April, 1862, the defendants, Caroline C. Hatch, Alfred H. Duncombe and Samuel M. Elliot, executed to the plaintiff, as such receiver, in the action above mentioned, under and in pursuance of an order of this court, a bond in writing, under their hands and seals, and acknowledged, a copy of which bond and acknowledgments are set forth in the complaint in this action.

4th. That at the time of the execution of the said bond by the said defendants, the plaintiff had been appointed and qualified as receiver in the two proceedings and judgments mentioned in the complaint in this action.

5th. That before the commencement of this action, the plaintiff, as such receiver, under and in pursuance of an order of this court, received from the said Claiborne Ferris the sum of \$2000, in full payment for the said judgment recovered against him; and said judgment, as to him, was thereupon satisfied of record.

And as conclusion of law, the judge found that the plaintiff was entitled to recover of the defendants the sum of \$5000, being the amount of the bond above mentioned.

To which findings and conclusions of law the defendant, Alfred H. Duncombe, within the time prescribed by law, excepted.

Ten Broeck & Van Orden, for the appellant. I. The original affidavit and order in the court of common pleas, upon which the order appointing a receiver was based, was not introduced in evidence, nor was it shown that any judgment had been recovered and execution issued and returned

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unsatisfied to warrant an order supplementary to execution, so as to give jurisdiction to the judge who made the appointment of the plaintiff as receiver. The proceeding supplementary to execution, is a special proceeding, and no presumption exists that the judge was authorized to make the appointment, and that the proceedings anterior to the appointment to give him jurisdiction, had been properly taken. (*See 5 How. 426 ; 13 id. 383 ; Wegman v. Childs, 44 Barb. 403 ; Coope, v. Bowles, 28 How. Pr. 10.*)

II. The bond given by the defendant and his co-surety to the plaintiff as receiver, does not estop the defendant from objecting to the want of evidence to show the regularity of the proceedings for his appointment as receiver, and that the officer acquired jurisdiction. This action could not be maintained by the plaintiff, without showing a regular and valid appointment, including the necessary proceedings anterior to give jurisdiction. The defendants were not called upon to inquire whether the plaintiff was properly appointed receiver when they executed the bond. They, of course, knew nothing about it, and the plaintiff in taking the bond to himself as receiver, was not relieved from the necessity of establishing his appointment properly. If not duly appointed receiver, the bond, although made to him, could not be made available. It was void. (*7 Barb. 253. 1 Denio, 184. 4 Hill, 598.*)

III. The judgment roll in evidence has created a greater obligation than existed at the time of the execution of the bond, to the prejudice of the defendants, and without notice to them. This bond was executed under peculiar circumstances. A demurrer had been unwisely interposed in the case of *Scott, receiver, &c. v. Claiborne Ferris, Mrs. Hatch and others*, and the defendant Hatch was allowed to answer, on giving this bond. The receiver represented two judgment creditors, amounting to \$2243.77, and if it had not been given, the receiver could only have taken judgment then to pay the two judgment creditors for whom he was receiver. The bond was given to answer the claims of these two cred-

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itors as the penalty plainly exhibits, and did not represent the entire property alleged to have been held by Mrs. Hatch and others. The plaintiff was not appointed receiver in relation to the two last judgments provided to be paid in the judgment roll, until more than a year after the bond was given, 'as appears by the evidence, and these judgments were provided by the judgment roll in evidence to be paid out of the moneys collected of Mrs. Hatch, and to which this bond is now improperly sought to be applied. In construing a writing, it is proper to look at all the surrounding circumstances, the pre-existing relation between the parties, and then to see what they mean, when they speak. (10 *Paige*, 43. 3 *Kern*. 569. 3 *Edw. Ch.* 244.)

IV. Although a receiver is nominally appointed as such in supplementary cases as to all the property of the defendant, it has never been regarded in judgment creditor cases that he was authorized to hold more property than was supposed to satisfy the creditor or creditors in whose behalf he was appointed receiver in other cases. If it be otherwise, then upon the appointment of a receiver in a case where the judgment might not exceed \$100, property to an unlimited amount might pass to the receiver, which would be a monstrous outrage upon a defendant who might be perfectly solvent, and only embarrassed by a small judgment. The cases in which a receiver is entitled to all the property of a defendant, are where creditors, of every class, are entitled to come in and share in the property, and the receivership operates for the benefit of all creditors on the basis of insolvency, and a general winding up of the defendant's affairs. Not so in a case of judgment creditors proceeding for their own benefit; true any creditor could take the like proceeding, and be entitled to have the same receiver appointed; but if in the case in which the receiver was first appointed, before another case occurred, the amount was paid, the receiver could be discharged from his trust. This principle is recognized by the plaintiff in the judgment roll in evidence, by providing for

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the payment only of the judgment in which the plaintiff had been appointed receiver. (*See 2 Sandf. Ch. 513.*)

V. There is no proof that Mrs. Hatch or the defendants had any notice of the judgment against Mrs. Hatch, or that any demand was made upon her, or upon the defendants, before suit brought.

VI. The judgment against Claiborne Ferris and Mrs. Hatch was in reference to the same property. Ferris being held liable for a part, and Mrs. Hatch for the whole, by the judgment it is provided that the amount collected from Ferris should be credited on account of the judgment against Mrs. Hatch. Ferris, before the commencement of this action, paid \$2000 in compromise of his judgment, amounting to \$2840.50, and this amount is to be credited on account of the judgment against Mrs. Hatch, if not the whole amount of the judgment. The defendant claims that this payment is in effect a payment by Mrs. Hatch upon the judgment, and is to be applied by the court, and *enures* for the benefit and relief of the sureties in the bond on account of their liability, if any. The payment should be treated as a payment of so much of the judgment against Mrs. Hatch as the sureties would be liable to pay, rather than to be applied in such a manner as to extinguish so much of the judgment against her, leaving the balance open upon which to charge the sureties in the bond. Mrs. Hatch would have a right to so order a payment that her sureties would be relieved to that extent, and in view of a general application, the court will make such an order as shall be just and equitable to relieve the sureties to the extent of the payment, and if not to the full extent, then at least *pro rata*. They will do what Mrs. Hatch was in honor bound to do in the premises. Mrs. Hatch could have provided the sureties with funds to relieve themselves first. A payment upon such a judgment should be so regulated as to relieve the sureties, for it is beneficial to Mrs. Hatch that such a disposition should be made. (*See 9 Cowen, 775, note ; 10 Barb. 183 ; Story's Eq. vol. 1, p. 497 ; Burge*

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on *Sureties*, pp. 122, 130-32; *Story on Contracts*, § 883; *Story's Eq.* § 324; *Bridenbecker v. Lowell*, 32 Barb. 9, 22, to 24; 8 Wend. 403; 11 *id.* 62; 10 *Pick.* 129.)

VII. Sureties are entitled to the special protection of the court, and upon equitable principles will always be relieved in preference to allowing a creditor to pay himself at their expense, unless the payment is specially made to their exclusion.

C. Bainbridge Smith, for the respondent. I. There is in fact no legal or equitable defense to the bond given by the defendant to the plaintiff. It is not a statutory bond, and the principles of law governing it are the same as any voluntary instrument under seal, given by one party to another, for a valuable consideration. The exceptions taken at the trial are all untenable. 1. The objection and exception to the judgment are not well taken, because the judgment cannot be impeached in a collateral action or proceeding. It is *res inter alios acta*. (*Gelston v. Hoyt*, 13 John. 561. *Sweet v. Barney*, 23 N. Y. Rep. 335, 341.) 2. The exception to the order of the court of common pleas, in which court the plaintiff was originally appointed receiver, has no force, as the action is maintainable, whether such leave had been given or not. 3. The plaintiff, as such receiver, commenced the action in which the bond was given. The defendant accepted the favor which was extended to him by the court, upon condition; he gave the plaintiff, as such receiver, the bond in question. The plaintiff, as such receiver, recovered in that action, and the defendant is estopped from denying the plaintiff's title to the bond, or that he was receiver. It was therefore not necessary to produce the order appointing the plaintiff as such receiver. Besides, the order appointing the plaintiff receiver could not be inquired into collaterally. (*Tyler v. Willis*, 33 Barb. 327.) 4. The motion to dismiss the complaint, and the exceptions taken to the refusal thereof,

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are not available. (a.) If it were not necessary to produce the order itself, it was not incumbent on the plaintiff to furnish the original affidavit and papers upon which the order appointing him receiver was based. (b.) The same objection applies to the second ground upon which the defendant moved for a dismissal of the complaint. (c.) The third ground of dismissal, that the judgment offered in evidence created a greater obligation than existed at the time of the existence of the bond, is not well founded, as it is not true in fact, and the objection could not be raised collaterally. (See above.) (d.) The exception that the bond is not in accordance with the order, was not approved by a justice of this court, and has never been accepted by the court, is not well founded. The bond does conform to the order. If it did not, the defendant executed it, and the plaintiff accepted it. It is not a statutory bond, but one voluntarily given to the plaintiff, for a valuable consideration. The defendant having had the benefit for which the bond was given, cannot object that it does not exactly conform to a certain order of the court. The answer to the objection, that no demand had been made upon the defendant Hatch, nor upon the sureties, is that none is necessary. (*Douglass v. Howland*, 24 Wend. 35, 48. *Brookbank v. Taylor*, Cro. Jac. 685. *Birks v. Trippett*, 1 Saund. R. 32. *East River Bank v. Rogers*, 7 Bosw. 493.) 5. The two propositions urged upon the court by the defendant are not well taken. (a.) The bond speaks for itself, and its validity does not depend upon the order ; but if it did, that shows the object for which it was given. There is no testimony, nor any offered, tending to show the bond was given for the purposes alleged. If any such testimony had been offered, it would have been excluded, on the ground of its varying the written instrument. (b.) The judgment against Claiborne Ferris was recovered for property which he specifically received. (c.) The claim against the defendant, Claiborne Ferris, was alleged in the complaint at the time the bond was given. If it had been

intended that that claim, or the proceeds collected thereon, should be applied to the bond, a provision would have been made therein to that effect.

II. The judgment should be affirmed.

Ten Broeck & Van Orden, in reply. I. The point that the appointment of a receiver cannot be inquired into *collaterally* does not apply where the question of *jurisdiction* is raised, which may be started anywhere, or at any time.

II. The points that the recovery against Ferris was for property specifically received by him, and that the claim against Ferris was alleged in the complaint at the time the bond was given, and that if intended that that claim or the proceeds collected thereon should be applied to the bond, a provision would have been made accordingly, is answered by the fact that the claim against Mrs. Hatch covered the *same property* as the claim against *Ferris*, including all the property of the judgment debtor, which was the reason why the amount collected of Ferris was ordered to apply on the judgment against Mrs. Hatch and being in effect a payment by Mrs. Hatch on her judgment, the payment enured to the benefit of her sureties in the bond which was the first obligation in order. This is a case of a judgment secured to the extent of \$5000, while the judgment subsequently obtained is over \$11,000. The first payment by Mrs. Hatch should be applied on her bond, to relieve her sureties.

III. The civil law recognizes the doctrine of protecting sureties in a case of this kind. The common law in England has adopted the same doctrine, and the same doctrine has been adopted in this state. (*See cases cited under 6th point of appellant.*) Whether *several debts* are owing and one secured or one debt in part secured, the principle is the same. The payment to the receiver is a payment to the court on account of a judgment in favor of the receiver, and is to be applied by the court as they shall deem equitable upon

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the principles before stated. *It is not the case of an ordinary creditor.*

By the Court, SUTHERLAND, J. It appears on the face of the bond upon which this action was brought, that if it was executed to the plaintiff as receiver, &c. and considering this, and the circumstances under which the bond was executed, I think its execution must be deemed an admission by the obligors, not only that the plaintiff had been duly appointed receiver, but also that the receiver was authorized to bring the action mentioned in the condition of the bond. It appears to me therefore, that it was not necessary for the plaintiff on the trial, to introduce the original affidavit and supplemental order in the court of common pleas, nor to show the judgment recovered, and execution issued and returned; especially as the defendant Duncombe had not set up in his answer, that the plaintiff had not been regularly appointed receiver, and made no attempt to show that he had not been, on the trial. I doubt whether it was necessary for the plaintiff to introduce even the original order appointing him receiver, or his bond as receiver.

The plaintiff was first appointed receiver by Judge Hilton, of the common pleas, in 1861, in two cases, the judgments in which amounted to \$2243.77. The bond on which this action was brought was given in April, 1862; its penalty is \$5000, and its condition, to obey and pay any judgment the plaintiff might recover against the defendant Caroline C. Hatch, in the action brought by the plaintiff as receiver, and mentioned in the condition of the bond. Subsequently, and in July, 1862, the plaintiff was appointed receiver in two other cases, by Judge Brady of the common pleas, the judgments in which amounted, in the aggregate, to about \$3500. Subsequently, and in December, 1864, the plaintiff recovered judgment in the action brought by him as receiver, mentioned in the condition of the bond, against the defendant Caroline C. Hatch, for \$11,003.63. The defendant Dun-

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combe insists that he is liable on the bond only to the extent of the amount of the two judgments in the cases in which the plaintiff was originally appointed receiver, on the ground that it must be presumed that he incurred his liability by signing the bond, as surety, with reference only to those two judgments.

This point is not without force, but I think the answer to it is, that he must be presumed to have known the law, when he executed the bond, and that the plaintiff might subsequently be appointed receiver in other cases, and if he was, that there might be a judgment against Caroline C. Hatch in the action by the receiver in which the bond was executed, for an amount sufficient to cover and satisfy the aggregate of the judgments in all the cases in which the plaintiff had been appointed receiver. The condition of the bond being to obey and pay any judgment the plaintiff, as receiver, might recover in the action in which the bond was given, I do not see how the defendant Duncombe can avail himself of this point.

As to the direction in the judgment obtained by the receiver in the original action, that any amount collected of the defendant Ferris on the separate judgment against him should be credited on the judgment against Mrs. Hatch, if you deduct from the judgment against Mrs. Hatch the \$2000 paid by Ferris to the receiver, there still remains due on the judgment against Mrs. Hatch an amount far beyond the penalty of the bond, for which the judgment in this action was rendered. The direction in the original judgment obtained by the receiver is, that the money collected of Ferris be credited on the judgment against Mrs. Hatch, not on the bond on which this action was brought. Though there is certainly some show of equity in the position taken by the defendant Duncombe as to the application of the \$2000 received of Ferris, yet I do not see how we can consider that money as received and indorsed on the bond.

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Upon the whole, though I am not free from doubt whether the judgment on the bond, as to the defendant Duncombe, should be affirmed to its full extent, yet I think it must be so affirmed, with costs.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Sutherland and Ingraham, Justices.*]

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 WILLIAM H. KILMER and ANNA KILMER, vs. JOHN WILSON.

M. & W. were the owners of adjoining farms, that of M. lying between the farm of W. and the public highway. M. conveyed to W. a strip of land, 24 feet wide, and extending from the land of W. to the highway, by deed containing the following provisions: "The said party of the first part, for and in consideration of one dollar * * * and for the faithful performance of certain things hereinafter mentioned to be done and performed by the party of the second part, his heirs and assigns, has granted, aliened, remised, released and confirmed, and by these presents doth grant, &c. unto the said party of the second part, and to his heirs and assigns, all that certain strip of land hereinafter described, of the width of 24 feet, for a *private road*." * * * "The said party of the second part binds himself, his heirs and assigns, to and with the party of the first part, his heirs and assigns, that they may *have free and full permit to travel the said road*." The deed contained the usual covenant of warranty.

Held; that the deed conveyed the strip of land in fee; the covenant, on the part of the grantee, securing to the grantor the right to travel upon the said road, being consistent with the assumption that the grantee was to, and did, become the owner of the land, reserving to the grantor merely the right to travel thereon.

THIS is an appeal from a judgment entered upon the report of a referee in favor of the defendant, dismissing the complaint of the plaintiff, with costs. The action was brought by the plaintiff, among other things, to have the rights of the parties ascertained and declared, in regard to the premises described in the complaint, and in the deed therein mentioned, and to recover damages for wrongfully withholding such premises from the possession of the plaintiff. The referee

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reported in favor of the defendant. Judgment was entered, upon his report, and the plaintiff appealed.

Ira Shaffer, for the appellant.

H. S. McCall, for the respondent.

By the Court, INGALLS, J. On the 31st January, 1848, William Moore and James Wilson were each the owner of a farm situated in the town of Bethlehem, Albany county. The farm of Moore lay between the farm of Wilson and the public highway, and Moore conveyed to Wilson the strip of land, in controversy, being 24 feet wide, and extending from the land of Wilson to the public highway. The material question, in this case is, whether Moore did, by the deed in question, convey the fee of the strip of land, or merely create an easement? The deed contains the following provisions: "The said party of the first part, for and in consideration of the sum of one dollar, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged and confessed, and for the faithful performance of certain things hereinafter mentioned to be done and performed by the party of the second part, his heirs and assigns, has granted, aliened, remised, released and confirmed, and by these presents do grant, release and confirm unto the said party of the second part and to his heirs and assigns, all that certain strip of land hereinafter described, of the width of 24 feet *for a private road.*" "The said party of the second part binds himself, his heirs and assigns, to and with the party of the first part, his heirs and assigns, that they may *have free and full permit to travel the said road.* The deed contains the usual covenant of warranty. In our opinion, the deed conveyed the land in fee. The covenant on the part of Wilson, the grantee, securing to Moore, the grantor, the right to travel upon the said road, is certainly consistent with the assumption that Wilson was to, and did, become the owner of the land,

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reserving to Moore merely the right to travel thereon. Any other construction would be unreasonable, and against the apparent intent of the parties, in making this arrangement. The covenant of warranty is in harmony with the view thus taken, and tends to confirm it. The nature and effect of such covenant is well defined by Judge Brown, in *The Long Island Railroad Co. v. Conklin*, (32 Barb. 388.) He remarks: "Its effect is limited expressly to assure the title of the grantee, to the lands granted in the premises of the deed; for it would be absurd to make such a covenant in respect to lands, the title to which remained in the grantor." The case cited bears, in other respects, with considerable force, upon the case at bar, in regard to the construction which the deed in question should receive. (See also *Dennison v. Ely*, 1 Barb. 612; *Nicoll v. N. Y. & E. Railroad Co.*, 12 N. Y. Rep. 121; *Tabor v. Bradley*, 18 id. 111; 3 *Kent's Com.* 419.) The words "for a private road," which precede the description of the premises, taken in connection with the covenant, on the part of the grantee, that the grantor, his heirs and assigns, should have "free and full permit to travel the aforesaid road," have the effect to limit the general use of the strip of land by the grantee so as not to deprive the grantor of the right reserved to travel upon the same. But to give these words the controlling effect claimed by the plaintiff would, in my judgment, be in conflict with the plain words of the grant, and the obvious intention of the parties thereto. It is an established rule, in construing a conveyance, to ascertain, and as far as the rules of law will allow, give effect to, the intention of the parties. But when the words of a grant are doubtful, they are to be taken most strongly against the grantor. (*Hathaway v. Power*, 6 Hill, 453. *Jackson v. Blodget*, 16 John. 172.) It is quite clear that Moore intended to convey this strip of land to Wilson, retaining the right to pass over it, and that is accomplished by the construction which has been given to the deed in question. The referee properly excluded the evidence under the offer of the plaintiff to show

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that the defendant told the plaintiff, he would give \$30 to own the land embraced in the strip, and was willing to be taxed for it. Such evidence would have the effect to contradict the deed, or at least to substitute the loose declaration of parties for the written instrument, which is the best evidence and must control. The judgment must be affirmed, with costs.

[ALBANY GENERAL TERM, May 6, 1867. *Peckham, Ingalls and Hogeboom*, Justices.]

 PRATT vs. BOGARDUS and VAN NATTA.

Where proceedings before an inferior tribunal are attacked collaterally, great latitude of construction is to be indulged, in support of jurisdiction.

It is never necessary to state, in a criminal warrant, the evidence by which the charge is to be supported. All that is required, in that particular, is to "recite the accusation."

This requirement is satisfied by a statement which indicates with reasonable certainty the crime sought to be charged.

Where a warrant, issued by a justice of the peace, after stating time and place, alleged that the defendant "designedly by false pretenses, did obtain from" the complainant "one sulky of the value of \$30, the property of * * * with intent to cheat and defraud" the complainant; *Held* that this was a valid warrant upon a complaint for obtaining property by false pretenses, although the pretenses used were not set out therein.

Where, in issuing a criminal warrant, a justice of the peace possesses, and is exercising a general jurisdiction of the subject matter, and not a special jurisdiction over a particular offense, created by statute, and thereby restricted as to the manner of proceeding, all that is required, to protect him in so doing, is that the evidence produced is colorable—something upon which the judicial mind is called upon to act, in determining the question of probable cause.

Where the affidavit, upon which application for a warrant was made, stated, in substance, that the defendant did designedly and by false pretense obtain from the complainant one sulky, of the value of \$30, by falsely stating and representing to him that his own sulky was hard to ride in, and that he desired the complainant's sulky to go to Albany, and would return it the next week, but that on the contrary he shipped it from Albany to Fort

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66h	233
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74h	342
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148a	269
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38ap	275

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Plain, with intent to cheat and defraud the complainant; *Held* that this was colorable evidence, sufficient to call upon the justice to exercise his judgment, in determining the propriety of issuing process; and that having acted in good faith, he should be protected.

THIS is an appeal from a judgment entered in favor of the plaintiff, against the defendants, for \$311.12, damages and costs, upon a trial at the Albany circuit in February, 1866.

O. M. Hungerford and A. J. Parker, for the appellant.

N. C. Moak, for the respondent.

By the Court, [INGALLS, J. This cause was tried at the Albany circuit, as an action for false imprisonment, and the defendants attempted to justify the arrest and imprisonment under and by virtue of a warrant issued by the defendant Bogardus, who was a justice of the peace of Albany county, upon the application of the defendant Van Natta. The vital question in this case is, whether the application and warrant were sufficient to confer jurisdiction upon the justice? If they were, both defendants are protected; and if not, both are liable. The court charged the jury, in substance, that the warrant was defective upon its face, for not charging a criminal offense, and that the justice who issued the warrant, and the defendant Van Natta who procured it, and directed the deputy sheriff to serve it, were liable in this action, for false imprisonment. The defendants' counsel excepted to the charge. The complaint and warrant were as follows:

"ALBANY COUNTY, ss: Stephen D. Van Natta, of the town of Knox, in the said county, being duly sworn and examined, makes complaint and says, that on or about the first day of June, 1864, at the town of Knox, aforesaid, Ferrand T. Pratt, did designedly and by false pretense, obtain from him one sulky, of the value of \$30, by falsely stating and

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representing to him that his sulky was hard to ride in, and that he was going to Albany city, and that he would leave his sulky with him, the said Stephen D. Van Natta, and would return it the next week, whereas, in fact, he did not so return it, but took it to Albany and had the same shipped to Fort Plain, with intent to cheat and defraud the said Stephen D. Van Natta.

STEPHEN D. VAN NATTA.

Sworn and subscribed before me,
this 16th day of July, 1864.

E. N. BOGARDUS, Justice of the Peace."

"ALBANY COUNTY, ss :

To any constable of the said county, greeting :

Whereas, Stephen D. Van Natta hath this day made complaint on oath before me, Ephraim N. Bogardus, a justice of the peace of the said county, that on or about the first day of June, 1864, at the town of Knox in the said county, Ferrand T. Pratt designedly, *and by false pretenses did obtain from him one sulky of the value of thirty dollars, the property of Hiram P. Gage, with intent to cheat and defraud him,* the said Stephen D. Van Natta.

You are thereby commanded, in the name of the people of the state of New York, forthwith to apprehend the said Pratt and bring him before me, at my office in Knox aforesaid, to be dealt with according to law.

Given under my hand, at Knox, this 16th day of July, 1864.

E. N. BOGARDUS,

Justice of the Peace."

In determining the sufficiency of these proceedings, we must bear in mind that the same are attacked collaterally, and hence great latitude of construction is to be indulged in support of jurisdiction. The following authorities show to what extent this doctrine has been carried : *Hannon v. Butterson*, (1 Denio, 537 ;) *Easton v. Calendar*, (11 Wend. 91 ;) *Matter of Faulkner*, (4 Hill, 598 ;) *Tallman v. Bigelow*, (10 Wend. 420.)

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It is never necessary to state, in a criminal warrant, the evidence by which the charge is to be supported. All that is required in that particular is to "*recite the accusation.*" (2 R. S. 730, § 3, *Edm. ed.*) Such requirement is satisfied by a statement which indicates, with reasonable certainty, the crime sought to be charged. In *Barbour's Criminal Law*, at page 525, the author remarks: "In all warrants, therefore, issued for the apprehension of persons under that provision, it is undoubtedly the only safe course; and in the absence of authority, we venture the opinion that it is indispensable to the validity of a warrant that it should contain a recital of the accusation, or *something equivalent to it.* Not that the evidence given on the examination need be stated at length, but enough should appear on the face of it to *inform the accused of the specific offense with which he stands charged*, and the place where it was committed, so that he may know what preparation to make in order to meet it." Same, (p. 526:) "But a warrant need not contain the facts on which the charge made is predicated. *It is sufficient in this respect if the nature of the offense is clearly specified.*" (See also *The People v. McLeod*, 1 Hill, 378.) Previous to the Revised Statutes, it was not necessary to incorporate the offense charged. (*Atchinson v. Spencer*, 9 Wend. 62.) The warrant, after stating time and place, proceeds: "That Ferrand T. Pratt designedly and by false pretenses did obtain from him, complainant, one sully of the value of \$30, the property of Hiram P. Gage, with intent to cheat and defraud him, the said Stephen D. Van Natta." Could any person have the slightest doubt in regard to the offense charged? The Revised Statutes, (vol. 2, p. 697, § 53, *Edm. ed.*) provide: "Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other *false pretense*," &c. The warrant in question uses the very words of the statute, "*by false pretenses.*" It is true those pretenses are not set out at large in the warrant; nor need they be,

as that would be, in effect, not a specification of the accusation, but a statement of the evidence by which the accusation was to be sustained. The court is not to presume, in order to defeat the jurisdiction, that the actual pretenses were of a nature at variance with the charge contained in the warrant. In *Foster v. Hazen*, (12 Barb. 550,) WELLES, J. says: "No presumption will be indulged in order to oust the justice of jurisdiction, *where enough is shown to bring the case within the general language of the act which confers the jurisdiction.*" The warrant was definite as to time and place, and stated an offense, showing that the accused was not entitled to a trial by special sessions, but was entitled to be discharged from arrest by giving bail. In *Blythe v. Tompkins*, (2 Abb. 468,) which is much relied upon by the counsel for the respondent, the arrest was under a special statute, and there was an omission to state the place where the liquor was sold; and as the offense was triable by special sessions, that statement became indispensable in order to determine the place of trial.

Again, the statute under which those proceedings were entertained, made the offense triable before the magistrate as a court of special sessions. The Revised Statutes, in prescribing the course of proceeding before special sessions, requires that the charge made against the defendant *as stated in the warrant of arrest or commitment*, shall be distinctly read to such defendant, who shall be *required to plead thereto*. It will be perceived that in that class of offenses, viz. those which are triable by special sessions, the warrant serves a two-fold purpose—to cause the arrest, and furnish the pleading. An examination of the case last referred to, will show that the decision was mainly placed upon the ground that the proceedings were under a special statute, and is clearly distinguishable from the case at bar. The case of *Comfort v. Fulton*, (39 Barb. 56,) is also cited. In that case the facts were stated in full, and the court held that the facts showed affirmatively that no criminal offense was

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charged, and therefore that there was not probable cause shown. We are clearly of opinion that the warrant stated with sufficient particularity the offense, and that the accused could not have entertained a doubt in respect to the character of the charge made against him.

It remains to be considered, whether the application for the warrant was sufficient to confer jurisdiction upon the justice to issue the same. We have already seen, from the authorities, that the proceeding is to be regarded with favor, and every reasonable intendment is to be entertained in support of jurisdiction, when attacked, as in this case, collaterally. In issuing the warrant in this case, the justice possessed and was exercising a general jurisdiction of the subject matter, and not a special jurisdiction over a particular offense created by the statute, and thereby restricted as to the manner of proceeding. (*Von Latham v. Libby*, 38 Barb. 339.) All that was required to protect the justice in issuing the warrant, was that the evidence produced was colorable—something upon which the judicial mind was called upon to act in determining the question of probable cause. The following authorities support this proposition: In *Vosburgh v. Welch*, (11 John. 175,) Thompson, J. says: "A mere error in judgment as to the legality of the proof offered would not make the justice a trespasser by issuing the attachment. But such proof, in order to give jurisdiction to the justice, ought at least to be colorable." In *Tallman v. Bigelow*, (10 Wend. 420,) Judge Nelson remarks: "There probably was sufficient to protect the justice and all others acting under the judgment, until its reversal." In *Van Alstyne v. Erwine*, (11 N. Y. Rep. 341,) Judge Denio says: "*A liberal indulgence must be extended to these proceedings, even upon a question of jurisdiction, if we would not render them a snare rather than a beneficial remedy.*" In *Miller v. Brinkerhoff*, (4 Denio, 120,) Judge Bronson remarks: "But when the proof has a legal tendency to make out a proper case in all its parts for issuing the process,

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then, although the proof may be slight and inconclusive, the process will be valid, until it is set aside by a direct proceeding for that purpose." (See also *Skinnion v. Kelley*, 18 N. Y. Rep. 355 ; *Cowen's Treatise*, 2d. ed. vol. 1, p. 480 ; *Matter of Faulkner*, 4 Hill, 598.)

Was, then, the application in question sufficient to confer jurisdiction ? The affidavit states, *in substance*, that said Pratt did designedly and by false pretense obtain from him (Van Natta) one sulky of the value of \$30, by falsely stating and representing to him that his sulky was hard to ride in, and that he desired his, (Van Natta's) sulky to go Albany, and would return it the next week. But, on the contrary, shipped it from Albany to Fort Plain, with intent to cheat and defraud said Van Natta. The false pretense consisted in his pretending that he desired the sulky in question to ride to Albany, and would return it, when by shipping it directly from Albany west to Fort Plain, a very different design was indicated, and from which might be inferred a fraudulent or even felonious intent to convert the property to his own use. (*The People v. Call*, 1 Denio, 120.) If Pratt had merely taken the sulky to Albany and there left it without disposing of it, it might be regarded merely as the violation of a promise, within the case of *Ranney v. The People*, (22 N. Y. Rep. 413.) The manner in which the accused disposed of the property indicated any thing but an honest intent ; and the pretense that he merely desired the use of the sulky for his comfort and convenience in riding to Albany, was false, and therein consisted the false pretense under which the property was obtained. The evidence upon which the warrant was issued was colorable, and sufficient to call upon the justice to exercise his judgment in determining the propriety of issuing process, and having acted in good faith, he should be protected. Justices of the peace are not generally lawyers, and are often required to issue process without much time for examination or reflection ; and when there is no evidence of fraud or oppression, they should receive all the

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protection which the courts charged with reviewing their proceedings can extend to them, consistently with a proper regard for the rights of parties against whom process is issued. We are of opinion that the proceedings were substantially regular, and furnished protection to the defendants. The charge of the learned justice was therefore erroneous upon a material question, and a new trial must be granted, with costs to abide the event.

[ALBANY GENERAL TERM, May 6, 1867. *Peckham, Ingalls and Hogeboom, Justices.*]

VIELE and others vs. Goss.

Though an individual is not obliged to answer inquiries in respect to the solvency of a third person, yet, having undertaken to do so, he is bound by every consideration of fairness and honesty, as well as by law, to speak truthfully, and is not at liberty to suppress a fact within his own knowledge, bearing materially upon the pecuniary responsibility of such third person.

Where the defendant, on being inquired of by the plaintiffs in regard to the solvency of another, omitted to state in his reply, the fact that the latter was largely indebted to him, at the time, and alluded to his indebtedness in such a manner as would naturally have the effect to quiet any apprehension on that subject, and produce the impression that it was quite inconsiderable; and within a few months the indebtedness of such third person to him ripened into a judgment which absorbed the entire property of the debtor; and it was shown that had the extent of such debtor's liability to the defendant been stated, credit would have been refused to him by the plaintiffs; *Held* that the defendant was liable to the plaintiffs for the value of goods sold to such third person, on the strength of the defendant's representations.

THIS is an appeal by the defendant from a judgment entered in favor of plaintiff for \$1956.90, upon a report of a referee.

H. V. Howland, for the appellant.

W. L. Learned, for the respondent.

By the Court, INGALLS, J. The plaintiff prosecutes this action to recover the amount of sundry bills for goods sold and delivered to one Ebenezer B. Belcher, upon the recommendation of the defendant in regard to the responsibility of said Belcher. The plaintiffs relied principally upon a letter addressed by the defendant to Edwin D. Woodruff, one of the plaintiffs, in answer to certain inquiries in reference to the solvency of said Belcher, and with a view to establish his credit. The facts are very fully found by the referee, and need not be repeated in this opinion. From a careful examination of the evidence we are satisfied that the referee has reached a correct conclusion in regard to the facts, and that he has correctly applied the law thereto. The letter addressed by the defendant to Woodruff, under date of 22d March, 1861, was well calculated to inspire confidence both in regard to the pecuniary responsibility of Belcher, and as to his business capacity and integrity. The defendant was not obliged to make any representations, but having undertaken to do so, was bound by every consideration of fairness and honesty, as well as by law, to speak truthfully, and was not at liberty to suppress a fact within his own knowledge bearing materially upon the pecuniary responsibility of Belcher. That he did, by omitting to state in his letter the fact that at the time, Belcher was largely indebted to him. The suppression of truth is often quite equivalent to the utterance of falsehood, and not unfrequently more mischievous in its consequences. The manner in which the indebtedness of Belcher is alluded to in the letter would naturally have the effect to quiet any apprehension on that subject, and produce the impression that it was quite inconsiderable. That the omission to state the extent of Belcher's liability to the defendant was important, appears from the positive evidence of one of the plaintiffs that if it had been stated credit would have been refused. And such evidence is confirmed by the fact that within a few months the indebtedness of Belcher to the defendant ripened

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into a judgment which absorbed the property of Belcher. Again : the statement in regard to Wiley's becoming a partner of Belcher, and thereby adding materially to the capital of the firm, could have no other effect than to create confidence, and induce a credit. We cannot avoid the impression produced by the letter, and the promptness with which the defendant collected his debt of Belcher, that the defendant favored the credit for the purpose of bringing within his own reach the property which should be acquired by Belcher from the plaintiffs, and thereby secure his own debt against Belcher. The referee has properly applied the law to the facts of this case. (*Allen v. Addington*, 7 *Wend.* 10. *Craig v. Ward*, 36 *Barb.* 377. *Zabriskie v. Smith*, 13 *N. Y. Rep.* 322. *Bean v. Wells*, 28 *Barb.* 466. *Bennett v. Judson*, 21 *N. Y. Rep.* 238. *Brown v. Montgomery*, 20 *id.* 287.)

We do not think an error was committed by the referee which calls for a reversal of the judgment, by admitting the letter addressed by the defendant to Morrison. In actions of this character great latitude of examination is allowed, with a view to arrive at the intention of the party in regard to the alleged fraud. (*Hall v. Naylor*, 18 *N. Y. Rep.* 588. *Cary v. Hotailing*, 1 *Hill*, 311. *French v. White*, 5 *Duer*, 254.)

Again : if that evidence was stricken from the case there would still remain quite sufficient to support the decision of the referee, and we can hardly assume that the result would have been different if this evidence had been excluded. (*Woodruff v. McGrath*, 32 *N. Y. Rep.* 255. *The People v. Gonzalez*, 35 *id.* 49. *The City Bank of Brooklyn v. Dearborn*, 20 *id.* 244. *Forrest v. Forrest*, 25 *id.* 510. *Marclay v. Shults*, 29 *id.* 356.)

The judgment should be affirmed.

[ALBANY GENERAL TERM, May 6, 1867. *Peckham, Ingalls and Hogeboom*, Justices.]

VAN VALKENBURGH *vs.* STUPPLEBEEN.

In an action upon a promissory note, brought by a person who is not a *bona fide* holder thereof, he having assumed no liability nor parted with any thing as a consideration for the delivery of the note to him, any defense which could have been interposed by the defendant to the note in the hands of the payee, is available to such defendant.

Under the provision of the Code allowing a defendant to plead and sustain by evidence any defense, legal or equitable, which he may have, the defendant in such an action may set up as a defense, and prove, a verbal agreement accompanying and qualifying the delivery of the note, in connection with a subsequent surrender of property to, and acceptance thereof, by the payee, upon which a surrender of the note, while in the hands of the payee, would have been compelled, in equity, before the Code.

Otherwise, if the note had been transferred, before maturity, to a *bona fide* holder.

THIS is an appeal by the plaintiff from a judgment rendered in favor of the defendant for costs. The action was tried at the Columbia circuit, April 13, 1864.

R. E. Andrews, for the appellant.

C. P. Collier, for the respondent.

By the Court, INGALLS, J. The action is upon a promissory note executed by the defendant to one Michael A. Emerick and by him delivered to the plaintiff to secure him as indorser upon a note for the benefit of said Emerick, which indorsement was made prior to the execution of the note in question. The defendant interposed, as a defense to the note, that at the time of its execution there was a verbal agreement between the defendant and Emerick, in substance, that Emerick should transfer to the defendant certain property, for which the defendant was to execute promissory notes, and in case Emerick was successful in settling the affairs of one Leggett who had previously failed, and assigned to Emerick who was surety for said Leggett, then the said Emerick was to receive

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back the said property from the defendant and surrender to him the notes which the defendant executed therefor. Evidence was produced upon the trial from which the jury were at liberty to find such agreement, and that such property was surrendered to Emerick by the defendant in accordance with said agreement. The court charged the jury in substance, that if they were satisfied from the evidence that such agreement was made at the time the note was executed, and annexed to the delivery thereof, and the property was surrendered to Emerick in accordance with such agreement, the defendant was entitled to their verdict; otherwise the plaintiff was entitled to recover. It is very clear that the plaintiff was not a *bona fide* holder of the note in question, as he assumed no liability, nor parted with any thing, as a consideration for the delivery of the note to him. And consequently any defense which could have been interposed by the defendant to the note in the hands of Emerick, growing out of the said transaction, was available to the defendant in said action. In *The N. Y. Exchange Co. v. DeWolf*, (31 *N. Y. Rep.* 273-284,) Davies, J. remarks: "The defendant can therefore avail himself of every defense which he could have done if the suit had been in the name of and for the benefit of the Atlas Mutual Insurance Company." (*See also Prentiss v. Graves*, 33 *Barb.* 622.) In an action at law, prior to the Code, this defense would not probably have been available to the defendant; but the Code has introduced a new system, by which a defendant may plead and sustain by evidence any defense legal, or equitable, which he has to the cause of action of the plaintiff. (*Code*, § 150, *subd.* 2.) "The defendant may set forth by answer as many defenses, and counter-claims as he may have, whether they be such as have been denominated legal or equitable, or both." If therefore the verbal agreement which accompanied the note, taken in connection with the subsequent surrender of the property to Emerick, and the acceptance thereof by him, constituted a cause of action in favor of the defendant, by

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which a surrender of the note in question in the hands of Emerick would have been compelled, in equity, before the Code, I do not perceive why such defense is not available by way of answer, in this action, under the provision of the Code which has been referred to. We think it can hardly admit of a doubt but that a court of equity, under such a state of facts, would decree a surrender of the note in question by Emerick, if it was in his possession, and we have seen that the present plaintiff occupies a no more favored position. If then the defense is allowable, *the evidence offered to support it was also admissible*. In *Despard v. Walbridge*, (15 N. Y. Rep. 378,) Selden, J. says: "The only question therefore on this subject is whether the equity rule is applicable to the present case, which is purely a legal action. As, however, since the enactment of the Code of Procedure, a defendant may avail himself of an equitable as well as a legal defense in all cases, whatever may be the nature of the action, there would seem to be but little room for doubt upon the point. That a deed absolute on its face was intended as a mortgage would before the Code have been an equitable defense, *because it could not have been proved at law*. In order that it should now be made available in legal actions as provided by the Code, *the evidence to establish it must be admitted in that class of actions*." (See also *Hodges v. Tennessee M. Ins. Co.*, 8 N. Y. Rep. 416; *Allen v. H. R. M. Ins. Co.*, 19 Barb. 442; *Nichols v. Smith*, 42 id. 382; *Sawyer v. Chambers*, 44 id. 42.) The note in question was not delivered unconditionally by the defendant, but on the contrary, such delivery was qualified by the parol agreement which accompanied it, and formed a part of the transaction, and the surrender of the property which was the condition upon which the surrender of the note was to depend, has actually occurred. The court would hardly allow Emerick to retain the note after he had accepted the return of the property which was the only consideration upon which the note was executed. The delivery of the

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note to Emerick, under the circumstances, may be regarded somewhat in the character of a pledge. If the note had been transferred before maturity, to a *bona fide* holder, the defense would not have been available to the defendant, but against this plaintiff it can be asserted. We are therefore of opinion that no error was committed by the court, and the judgment should be affirmed, with costs.

[ALBANY GENERAL TERM, May 6, 1867. *Peckham, Ingalls and Hogeboom*, Justices.]

 BALLARD vs. BURNSIDE and others.

An instrument signed by four persons, by which they, six months after date, for value received, with use, jointly and severally promise to pay a person named, or bearer, the sums set opposite their names, for and in consideration of the right to make, use and vend a patent right in a specified district, is, in legal effect, a promissory note.

Each signer is jointly and severally liable for the whole amount subscribed, and the only effect of subdivision of amounts opposite each name is to determine their rights between themselves. It amounts to nothing as between the makers and the payee, or bearer.

Such an instrument is not to be construed as containing four separate contracts, requiring a five cent internal revenue stamp for each; but is sufficiently stamped, if a ten cent stamp be attached.

Even assuming that such an instrument contains four several agreements, it may be held good as to either of the signers, if offered in evidence on the trial, against him alone.

ACTION brought on the following instrument, against all the makers :

“Six months after date, for value received, with use, we jointly and severally promise to pay W. J. Van Slyck, or bearer, the sums set opposite our names, for and in consideration of the right to make, use and vend Hicks' & Peck's Stump

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Extractor, pat. Sept. 30th, 1862, for one undivided half of the town of Maryland, Otsego co. N. Y.

Maryland, Decr. 15, 1864.

	J. P. BURNSIDE,	\$75
[U. S. Rev. Stamp,	JEFFERSON MAYRE,	37.50
10 cents.]	LESTER H. BURNSIDE,	37.50
	AMOS TUBBS,	37.50 "

The action was tried at the Otsego county circuit, in June, 1866, and the above instrument having been proved, and that the plaintiff was the owner thereof, the same was offered in evidence, but was rejected by the court, on the ground that said instrument constituted four separate contracts requiring a five cent internal revenue stamp for each, and was, therefore, insufficiently stamped. To this ruling, the plaintiff excepted. The court then nonsuited the plaintiff, who again excepted. A new trial was asked for, on a case and exceptions.

N. C. Moak, for the plaintiff.

S. Crippen, for the defendant.

By the Court, BOARDMAN, J. If the instrument sued upon is a promissory note, there can be no doubt it was sufficiently stamped, under the provisions of our revenue law.

But it is contended, by the defendant, that the paper offered in evidence contains four contracts in one instrument, and, therefore, requires stamps for four agreements. Such was the view, we may presume, of the presiding judge. Even if we concede that this instrument contains four several agreements, I see no reason why it should not be held good as to the first signer, John P. Burnside; and it was offered in evidence, on the trial, against him alone, and rejected. Such seems to be the view of the English courts in similar cases. (*Rex. v. Recks*, 2 *Ld. Raym.* 1445. *Gilby v. Lockyer*, *Douglas*, 217, 218. *Doe v. Day*, 13 *East*, 241.) In these cases, the instrument was held to be good as to the first person who

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signed, but bad as to others, for want of stamps. But the courts have gone much further, and say that one stamp is sufficient in the following cases: when a number of persons severally bind themselves in a penalty by one bond, conditioned that each and every of them shall perform the same matter; when a debtor compounds with his creditors, and each creditor signs the same deed, (*Bowen v. Ashley*, 4 Bos. & Pul. 274; 1 New Rep. 278;) when several mariners join in a bill of sale of their several shares of prize money; (*Baker v. Jardine*, Tr. 1784, B. R.) when an agreement is made by several for a subscription to one common fund, though several as to each subscriber; (*Davis v. Williams*, 13 East, 232;) when an annuity by three is sold, one being a mere surety; (*Cook v. Jones*, 15 East, 237;) when several underwriters, on the same policy, all agree to refer the demand of the insured on such policy; (*Goodson v. Forbes*, 6 Taunt. 171;) where an apprentice was bound for seven years, the first four with A. B., and the last three with his father, to learn different trades, (*Rex v. Louatle*, 8 Barn. & Cress. 249;) where members of a mutual insurance company, all executed the same power of attorney, authorizing the persons therein named to sign the club policies for them, (*Allen v. Morrison*, 8 B. & C. 565.) These cases would seem to leave no doubt that this instrument (if an agreement) required but one stamp of five cents. Any other construction would lead to the greatest danger, and might result in the wildest injustice. The subdivision of a single instrument, to see how many separate and distinct contracts could be carved out, would be a work of great labor, requiring the most judicious care.

Whether the instrument be a promissory note, or an agreement, I am satisfied the stamps thereon were sufficient, and that the judge erred in that respect.

But it is claimed that the omission to cancel such stamp by initials and date indorsed thereon, instead of a simple cross, invalidates the instrument. But, I think, a careful reading of sections 156, 158 and 163, of the act of congress appro-

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ved June 30, 1864, under which this case is to be adjudged, will satisfy any one that the neglect to cancel will not invalidate the instrument. Such, at least, is the more prudent construction, and is approved of by 3 *Pars. on Cont.* 290. For the reasons which I have given, I think the nonsuit should be set aside, and a new trial granted, costs to abide the event.

But since some of the defenses interposed will depend entirely upon the question, whether this instrument is a negotiable promissory note, or an agreement, I feel it is due (though outside of the case presented) to pass upon that question.

Story (on Prom. Notes, § 1) defines a promissory note "to be a written engagement by one person to pay another person, therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Other authors require no more than Story, and generally they are less precise. This instrument contains all the requisites named, unless it be a certainty as to the sum of money. If it were a joint and several liability to pay \$187.50, and in other respects the same as it now stands, except the sums opposite each name, no doubt could arise. It would be conceded to be a promissory note. But is not such its legal effect, as it stands? Each one is jointly and severally liable for the whole amount, and the only effect of the subdivision of amounts opposite each name is to determine their rights between themselves. It amounts to nothing as between the makers and the payee, or bearer. I do not consider it any more open to objection than a note payable in installments. I cannot see that it lacks any element essential to a promissory note, nor does it possess an element hostile to such instruments.

New trial granted.

[BROOME GENERAL TERM, May 14, 1867. *Mason, Balcom and Boardman, Justices.*]

BUNNELL *vs.* GREATHEAD.

Where the real question involved in an action has not been presented, or determined, the verdict will be set aside.

The law is now clearly settled to be that if it appears, in an action for criminal conversation, that the husband consented to his wife's adultery, it goes in bar of the action.

If he was guilty of negligence, or of loose or improper conduct not amounting to a consent, it goes in reduction of damages.

If the husband had it in his power, and neglected to interpose, to prevent the debauchment of his wife, he can recover only the actual pecuniary damages which he sustained. (J. F. BARNARD, J. dissented.)

THIS action was for the recovery of damages against the defendant for an alleged criminal conversation with the plaintiff's wife; and the trial resulted in a verdict in the plaintiff's favor for \$10,000.

On a case and exceptions and on affidavits, a motion was made for a new trial on the grounds: 1st. That the verdict was excessive. 2d. Of surprise. 3d. That the verdict was against the weight of evidence. 4th. Of newly discovered evidence. The motion was denied by Justice BARNARD, at a special term, and from this order, and the judgment entered on the verdict, the defendant appealed.

Homer A. Nelson, for the appellant.

Collins Sheldon, for the respondent.

By the Court, GILBERT, J. This was an action of crim. con., in which the plaintiff got a verdict of \$10,000. The plaintiff, himself, was the only witness who testified to any act of criminal intercourse. According to his testimony he was present at the commission of one; saw his wife leave his house, pass within four feet of him, meet the defendant, who was waiting in his (the plaintiff's) yard, go to an outhouse with the defendant, have connection with him there, and he made no effort to prevent it, but crawled to a place, at a distance of eight or twelve feet from this outhouse, and there looked on and saw the act done.

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No error was committed by the judge at the circuit ; for his attention was not called to the rule of law involved. Whether he decided the motion for a new trial correctly or not, it is not necessary to consider. The verdict ought to be set aside, because the real question involved has not been present or determined. (*Catterall v. Hurdle*, *Law Rep. C. P. vol. 2*, 368.) The plaintiff had the power, and it was his duty, as a husband, to interfere and prevent the debauchment of his wife. It is a general rule of law that no one can maintain an action for a wrong when he has consented, or contributed to the act which occasions his loss. When an action is brought, for criminal conversation, the law is now clearly settled to be that if the husband consents to his wife's adultery, it goes in bar of the action. If he be guilty of negligence, or of loose or improper conduct, not amounting to a consent, it goes in reduction of damages. (*Per Buller, J. Duberley v. Gunning*, 4 *T. R.* 657. 1 *Selw. N. P.* 10th ed. *S. v.* (3.) *Winter v. Ham*, 4 *C. & P.* 498. *Calcraft v. Earl of Harborough*, 19 *id.* 496. *Reeve's Dom. Rel.* 3d ed. 140. 2 *Greenl. Ev.* § 51. *Seagar v. Sligerland*, 2 *Caines*, 219. *Travis v. Barger*, 24 *Barb.* 614.)

This rule of law seems to have been overlooked, throughout the case. The jury have not considered it. If the evidence of the plaintiff did not bar the action, it certainly entitled him only to the actual pecuniary damages which he sustained. No proof was given of any damages of that kind. To allow the verdict to stand would give legal sanction to conduct which, unless it can be in some way explained, deserves only severe reprobation. The jury should have an opportunity of determining these questions.

The judgment is reversed, and a new trial is granted, costs to abide the event.

J. F. BARNARD, J. dissented.

New trial granted.

[DUTCHESS GENERAL TERM, May 18, 1867. *Lott, J. F. Barnard and Gilbert, Justices.*]

ARNOLD and others vs. THE HUDSON RIVER RAILROAD
COMPANY.

A. being the owner of a mill factory, together with the easement, or right, to carry the waters of a creek across a certain parcel of land thereto, the defendant, for the purpose of constructing its railroad, acquired by purchase a portion of the land subject to such easement. The road being constructed in such a manner, and upon such a grade, that the water could no longer be conveyed to the factory across the land in a straight trunk, the defendant took down the original raceway, and carried the water under the railroad track, in a new trunk built for that purpose. A. accepted the new structure without objection, and used the water flowing through it, during his life; *Held*, that such acceptance of the substituted structure was in judgment of law a compensation for all damages sustained by A. in consequence of the removal of the original raceway.

The legislature may rightfully authorize the construction of railroads, or other works of a public nature, without requiring compensation to be made to persons whose property has not actually been taken, or appropriated, for the use thereof, but who may, nevertheless, suffer indirect or consequential damages by the construction of such works.

The case of a railroad company acquiring its roadway subject to an easement or servitude appurtenant to mill property, consisting of the right to carry water across the land of another, to the mill, is within the above principle.

If the owners suffer an injury by having the easement impaired, this is an injury which the property suffers in consequence of the construction of a public work, under legal authority, and not of the *taking* of the property.

Such a loss is to be regarded as *damnum absque injuria*, except in cases where, by statute, compensation is required to be made.

APPEAL by the plaintiffs from a judgment ordered at the circuit, on a trial before the court, without a jury. The plaintiffs alleged in their complaint that Daniel Arnold, late of the city of Poughkeepsie, owned, in fee, the right to take a certain amount and quantity of water out of a certain pond, made by a dam built and maintained across the Fallkill creek, east of Water street, in the city of Poughkeepsie, and to use the same for driving the machinery of certain factories owned by him, situated upon the west side of Water street, in said city of Poughkeepsie; and, also, the right to carry the water from said pond and dam, to said factories, over and across certain lands and premises, now owned by George Innis and

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others, in a raceway or trunk, and either over or under the ground ; that the said David Arnold had constructed a raceway across the lands last mentioned, for the purpose of conveying the water from the said dam to the said factories, as he had a right to do, and was accustomed to convey the water by said raceway to the factories aforesaid, which said raceway was constructed upon a straight line from said dam to the wheel upon which the water was discharged, without any interruption in direction or descent. That the said David Arnold being so seised and possessed of said easement and estate in fee, died during the year 1864, leaving a last will, whereby he devised the same to the above named plaintiffs, as tenants in common, and they are now the owners in fee, and in possession thereof. And the plaintiffs alleged that the defendants had entered in and upon the lands aforesaid, across which said raceway was constructed, and over which the said David Arnold carried the water to his factories, as he had a right to do, and wrongfully broke up and interrupted said water course, and without right or authority altered the same, so as to make the said water course pass under the track, and rails laid down and used by them, the said defendants, and so as to diminish the power and increase the expense and inconvenience of maintaining and using the same, and by means of the wrongful acts, and interference with, and alterations of the said raceway, it already needs repair and reconstruction, in that portion thereof which was taken up by the defendants ; whereas, the original trunk, where it has not been interfered with, remains in good order ; nor would any portion of the same have been worn out or destroyed by use, if the same had not been wrongfully interfered with by the defendants. That the defendants refuse to restore the said water course, and they refuse to repair or maintain the said raceway, or to pay any loss, damage or expense occasioned by their said wrongful acts. And the plaintiffs alleged that they had sustained loss and damage by the wrongful acts of the defendants in the premises, to the amount of \$6000, and

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they prayed judgment for such damages, besides costs of this suit.

The defendants, by their answer, denied the allegations of the complaint, and alleged,

2d. That they, the defendants, are a corporation organized under an act of the legislature of the state of New York, entitled, "An act to authorize the construction of a railroad between New York and Albany," passed May 12, 1846, and whatever acts were done by them, in reference to the water course, raceway, trunk, rights, easements and estate, which, in the said complaint, are alleged to have pertained to David Arnold, or to the plaintiffs, were done under and in pursuance of the authority of the said act, and of the acts amendatory thereof.

3d. That it was necessary, for the construction of the defendants railroad, between the cities of New York and Albany, to intersect and cross said water course; whereupon the defendants constructed their ways across and upon the same, and they restored the said water course, thus intersected, to its former state, in a sufficient manner, so as not to have impaired its usefulness.

4th. That the said David Arnold, at the time of the said construction and restoration, licensed and authorized the same, and approved of and acquiesced in the manner of the said restoration.

5th. That the defendants, before doing any act in reference to the said water course, raceway or trunk, or to the said alleged rights, easement or estate, became, by purchase, and ever since have been, and now are, the owners in fee of the land over and upon which it is claimed the water course, raceway or trunk was constructed, and in reference to which it is claimed that the alleged rights, easement or estate existed.

6th. That the cause of action, alleged in the complaint, did not accrue within six years before the commencement of this action.

Before commencing the trial, the parties, by their counsel,

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consented that upon the trial, if the judge should decide that the plaintiffs had a right of action, he should determine whether the plaintiffs were entitled to damages, and if so, might order the same to be assessed by a jury, or by a referee, or order a judgment directing the defendants to reconstruct and repair, and keep in repair, the apparatus built by the defendants to carry water across their track to the plaintiffs' mill, and should enter judgment accordingly, amending the pleadings, if necessary.

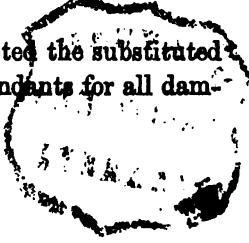
At the close of the testimony, the defendants' counsel moved to dismiss the complaint, and for judgment, on the ground that the defendants were authorized to do what they did, without compensation to Mr. Arnold. And that, if not, the plaintiffs' recovery was barred by the statute of limitations. The judge reserved the question, and afterwards found and decided as follows :

1st. That the several statements in the complaint, except as to the right of the defendants to do the acts complained of, and except as hereinafter found are substantially true.

2d. That the defendants are a corporation duly organized under the act of the legislature referred to in their answer, and did the acts complained of in the year 1850, in constructing their road, and under the authority of the said acts, and none of the said acts were committed since the year 1850.

3d. That the acts complained of were not done with the express consent of David Arnold in said complaint named, then the owner of the right alleged to have been violated, and under whom the plaintiffs claim title, but they were made with his knowledge, and he acquiesced in the change made by the defendants, having used the substituted structure from the time it was made, and repaired the same from time to time, until the time of his death in 1864 ; and the plaintiffs have since his death applied to the defendants to repair such substituted structure.

4th. That the said David Arnold accepted the substituted structure as a compensation from the defendants for all dam-



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ages sustained by him by reason or in consequence of their said acts, and in satisfaction thereof.

The said judge further found, at the request of the plaintiffs, on settling the case,

5th. That neither David Arnold, nor the plaintiffs, ever expressly agreed to accept the new structure placed there by the defendants as an equivalent for the structure built by him.

6th. That the defendants broke and interrupted a portion of the original structure, without David Arnold's knowledge, he not being apprised of it until the defendants had commenced the work of taking it down.

7th. That David Arnold forebore to prosecute or restrain the company at the time, upon being told by their agent, that they would make the water course as good as before, at their expense, and would keep the new structure in repair.

8th. That neither he nor the plaintiffs ever did any other act of acquiescence in what the defendants did, than by using the new structure, substituted for the old, in taking the water which flowed through it on their wheel, and taking the charge and control thereof, and by repairing the same, and calling upon the defendants to repair it, when it became out of order.

Upon the preceding facts the judge found, as a conclusion of law, that the plaintiffs had not established a cause of action against the defendants, and that the defendants were entitled to judgment against the plaintiffs, with costs, including an extra allowance of fifty dollars.

James Emott, for the appellants. I. The easement or right to carry the water of the Fallkill over the land purchased by the defendants, as well as the aqueduct by means of which that right was used and enjoyed, was property, and entitled precisely as all other property is, to the protection of the law, and the constitutional inhibition against taking private property for public use without compensation. (*People ex rel. Tibbetts v. Canal Appraisers*, 13 Wend. 355.

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Canal Appraisers v. People, 17 *id.* 571. *Commissioners of Canal Fund v. Kempshall*, 26 *Wend.* 404. 36 *Penn. Rep.* 194. *Ex parte Jennings*, 6 *Cowen*, 518–525.)

II. The acts of the defendants in first interrupting the flow of water and destroying the aqueduct, and then replacing it by a less efficient and less durable one, were direct and immediate acts of interference with our property. They were not lawful acts upon their own property, productive of mere consequential damages to us. We have lost, have been deprived of a certain portion of our easement and of our aqueduct. What we have lost the defendants have taken. If they could take away from us the part of which they have deprived us, they could take away the whole. If they could do what they have done with impunity, they could have cut off our aqueduct and turned the water it carried into the bed of the stream. (*Ellicottville Plank Road Co. v. Buffalo R. R. Co.*, 20 *Barb.* 644. *Mahon v. N. Y. Central R. R. Co.*, 24 *N. Y. Rep.* 658.)

III. The provisions in the defendants' charter authorizing them to cross streams, or water courses, and roads, on condition of restoring them to their usefulness, will not aid them here. 1. This water course and aqueduct was not restored to its former usefulness. The damages we seek are the precise difference between its former and its present condition. 2. Obviously the legislature did not intend or attempt by this clause to confer unlimited power on these defendants. The section referred to only means to authorize an interference with roads and streams without question, so far as merely public rights are concerned. And if it applies to private interests at all, it allows them to be taken *on condition* that the water course be made as good as before. This is only substituting compensation in kind for compensation in money; and one kind of compensation is equally a condition with the other. The requirement is peremptory. (*See Robinson v. N. Y. and Erie R. R.*, 27 *Barb.* 512, 521; *Brown*

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v. *Cayuga R. R.*, 2 *Kern.* 486 ; 27 *Conn. Rep.* 158 ; 21 *id.* 294.) The cases where this railroad company have built their road so as to cut off land from access to the river, (*Gould v. Hudson Riv. R. R. Co.*, 2 *Seld.* 522, and the like,) have no application to this question. They were decided on the ground that an owner of land adjacent a public river has no property in the bed of the stream or its waters, or any peculiar rights of access to its channel above any other person, by reason of his location. 3. By fair construction of this part of the defendants' charter, "restoring this aqueduct to its former usefulness," involves maintaining it at the same cost to the plaintiffs, and for the same time as the original aqueduct. Where a man was bound to build and maintain a gate, it was held he was bound not only to keep it up, but to keep it shut. (*Mace v. St. John*, 2d *dist. gen. term*, 1863.) 4. The defendants, by erecting any substitute for our original raceway, admitted their obligation to the full extent to which we insist upon it, that is, that they were bound to give us exactly what we had before, or pay us for it. If they were not bound to do this they were not bound to do any thing. 5. The defendants owned the land and occupied it with their rails traversed by their trains. They built, and of course could build for our use just what they chose. They might have made a structure as complicated, as difficult to use, and as costly to maintain as they chose. We could not control them in any way, except by the assertion of the right to insist upon having returned to us exactly what we had before. No other principle could be applied.

IV. If the charter of the defendants, in authorizing them to interfere with natural or artificial water courses in building their road, provided they restored them to their former state, so as not to impair their usefulness, has reference to any thing more than public rights in roads or streams, it is in violation of the constitution. When they took away our water course and aqueduct, they took our property.

When they gave us back something else in place of it, they did not return our property, unless they gave us what we had. For what they took away from us we are entitled to "just compensation," and until it was made their acts were wrongful. (*Ellicottville Pl. R. Co. v. Buffalo R. R. Co.*, 20 Barb. 644. *Robinson v. N. Y. and Erie R. R. Co.*, 27 id. 512, 521. *Brown v. Cayuga and Susq. R. R. Co.*, 2 Kern. 486. *Matter of Hamilton Av.* 14 Barb. 405. *Miller v. N. Y. and Erie R. R. Co.*, 21 id. 513.)

V. The decision of the learned judge, before whom the cause was tried, that David Arnold acquiesced in the acts of the defendants, and accepted their substituted structure as a compensation for damages and satisfaction for their acts, and he and his devisees are thereby barred of any action against the defendants, we respectfully submit is erroneous. 1. The only acquiescence alleged is by using the new structure, by calling on the defendants to repair it, and by repairing it ourselves when they refused to do so. 2. This is not an acceptance or an acquiescence which would bar this suit, because our use of the structure, and our forbearance to prosecute for the change, or to prevent it when first attempted, was upon condition, and under express agreement by the defendants to keep the new structure in repair. It is true this agreement was verbal, but so was our consent and acceptance of the new structure. If they can base a defense on the one, we can sustain an action on the other. 3. The original aqueduct was real estate, and the easement which was enjoyed by means of it was an incorporeal hereditament. Neither could be granted, surrendered or released except by writing, and any such consent or acquiescence as the defendants allege, and the judge finds, was at most a *license*. Such license was revocable at will, and was revoked by the death of David Arnold. (*Eggleston v. N. Y. and Harlem R. R. Co.*, 35 Barb. 162.)

VI. The plaintiffs' remedy is not barred by the statute of limitations. The action or claim of the plaintiffs is not

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for a liability created by statute. The defendants' liability is for an injury to a right of property, which the statute did not create or confer, and the remedy for its violation is not a statute remedy. To argue otherwise assumes that the defendants had a right to do what they did, that they did not take or invade our property, and would be under no obligation or liability to us at all, but for the voluntary act of the legislature requiring them to return the stream to its former usefulness. This is the very point in dispute.

VII. If the theory of the judge at the circuit be correct, that we accepted this structure, then we are entitled to this action to enforce the condition under which we accepted it. This is a continuing obligation, and we have a right to an action either for damages or specific performance whenever it is broken.

VIII. But if, as we assert, the defendants have invaded and taken our property without right and without compensation, their acts have been a continuing wrong, and an action would lie constantly for the damage they occasioned. Each day's continuance of the defendants' interference with our easement, of their deprivation of what we originally had, is a new wrong; and we can sue for any special loss thereby at any time within six years after its occurrence. (*Hampden v. N. Y. and N. H. R. R. Co.*, 27 Conn. Rep. 158. 10 Wend. 179.)

IX. It is no answer to this to say that the defendants' original acts were lawful. That depends upon whether their acts were a taking—a withdrawing from, us of property. If they were so, then they were not and could not be made lawful without compensation.

X. If the erecting the new structure is considered compensation, then it must be equal or equivalent to the old; and when it fails to be, we sustain a damage for which an action then accrues.

If this company had a right to enter on and interfere with our water course, but at the same time were bound to give

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it back again as good, that is as effective, as permanent and as inexpensive as before, David Arnold could bring no action against them until it turned out that his expense in keeping his water communication was actually increased. What action could he have brought the day after this new structure was erected, if the railroad company had a right to build it in lieu of his own, only being bound to make it as good as before to him. Clearly he could not sue until it proved not to be so. No court at that time would have listened to a speculation on the future. (21 Conn. R. 294. 37 Penn. R. 469. 19 Eng. L. and Eq. 295.)

Chas. A. Rapallo, for the respondents. I. By the 14th section of their charter the defendants are authorized to construct their railway across water courses, but they are required to restore any water courses thus intersected "in a sufficient manner so as not to have impaired its usefulness." The crossing or intersection of David Arnold's water course was therefore a lawful act, and did not give him or his representatives any cause of action. The only cause of action which he could by any possibility have had, would have been for a failure (if it had occurred) to restore the water course in a sufficient manner, as directed by the act.

II. The provision of the charter authorizing the intersection or crossing of water courses is undoubtedly valid. Even if the interference with such easements should be regarded as a taking of private property, within the meaning of the constitution, this provision of the charter is free from objection, because it provides adequate compensation, by requiring the company to restore the water course in a sufficient manner, &c. The consequential injury to adjoining lands by the construction of a public work, is not a taking of property within the meaning of the constitution, and compensation need not be made therefor. (*Corey v. Buff. &c. R. R. Co.*, 23 Barb. 482. *Gould v. Hud. Riv. R. R. Co.*, 2 Seld. 522.

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Getty v. Same, 21 Barb. 617. *Bellinger v. N. Y. Central R. R. Co.*, 23 N. Y. Rep. 42. *Ely v. City of Rochester*, 26 Barb. 133. *Plant v. L. I. R. R. Co.*, 10 id. 26.) Similar provisions as to crossing streams and cutting of wharves have been recognized as valid. (*Tillotson v. Hud. Riv. R. R. Co.*, 5 Selden, 575. *Cocks v. Same.*) And this, though the substituted structure was less convenient than the former one.

III. The evidence on the trial was sufficient to sustain the findings of the court, that David Arnold acquiesced in the change made by the defendants in the water course, and accepted the substituted structure as a compensation from the defendants, for all damages sustained by him in consequence of their acts, and in satisfaction thereof.

IV. If the substituted structure was sufficient, or was accepted as a sufficient compliance with the requirements of the act, neither David Arnold nor his devisees could have any action against the defendants. If it was not sufficient, and was not accepted, David Arnold had a right of action at once upon its completion, in the year 1850, and that right of action is barred by the statute of limitations. The statute begins to run from the time of the wrongful act or omission; not from the time the resulting injury is developed. (*Troup v. Smith*, 20 John. 32. *Argall v. Bryant*, 1 Sandf. 98, and cases cited.)

V. The statement of the defendants' land agent to David Arnold, that the company would make the water course as good as before, and keep the new structure in repair, does not afford a foundation for this action. 1. The company had a right, without Arnold's consent, to alter the water course, and the extent of the responsibility they incurred by so doing was to make the structure as good as before; there was therefore *no consideration* for a further promise to keep it in repair. 2. Some special authority in the land agent to make such a contract should have been shown. It was no

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part of his general duty to make contracts imposing greater obligations on the company than were imposed upon it by the statute. 3. This action is not brought upon any such contract. If it were, it would be a sufficient answer that the contract not being in writing was void, under statute of frauds—not being to be performed within a year.

VI. Even if David Arnold had a cause of action, it did not pass to the plaintiffs, as his devisees of the mill property. They are clearly not entitled to any damages sustained by him in his lifetime. They took, under his will, the water course as it was at the time of his decease; and even if the obligation of the defendants to restore it to its former usefulness had not been complied with, and it should be regarded as analogous to a covenant running with the land, yet such a covenant, after breach, would not pass to the devisee. It ceases, on its breach, to be a covenant real, and no longer runs with the land. (4 *John*. 72. 21 *Wend*. 120, *per Cowen*, J. p. 123. 5 *Conn*. 504.) The change in the water course was a permanent one. Whatever injury resulted therefrom was necessarily perpetual. The whole injury was therefore done in the lifetime of David Arnold, and if he had brought his action he could have recovered all his damages in one action, and could not have brought successive actions. No right of action passed to his devisees. (See *Fish v. Folley*, 6 *Hill*, 54.)

VII. The judgment should be affirmed.

By the Court, GILBERT, J. We are of the opinion that the acceptance by the plaintiffs' testator, of the structure which the defendants substituted in place of the one removed by them, was in judgment of law a compensation for the damages alleged to have been done to said testator. It was constructed by them for the purpose of fulfilling all their obligations in the premises to such testator. He accepted it as such. If it has failed to prove as durable as the old

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structure, (of which there is no certain evidence,) there is no principle of law or equity which would have allowed him to complain. And certainly the plaintiffs cannot be deemed to have acquired the easement in question otherwise than as qualified by the legal effect of these acts of their devisor. But if this view be erroneous, there are other principles which are fatal to the plaintiffs' right of recovery. The right of the plaintiffs is an easement, and is appurtenant to their mill property. It consists of the right to carry water from the Fallkill creek across the land of their testator's grantor, to the mill. This burden or servitude was annexed to the lands of said grantor, and the defendants, in the capacity of private owners, must be deemed to have acquired their roadway in subjection to this easement or servitude. (*Lampman v. Mills*, 21 N. Y. Rep. 505.)

But the general railroad act, which is expressly made applicable to these defendants, authorizes the defendants to construct their road across or upon the water course in question, and requires them to restore the same to its former state, or to such a state as not *unnecessarily* to have impaired its usefulness. (*Laws of 1850*, p. 211, § 28, *subd.* 5, § 49.) The charter of the defendants contained the same provision, omitting the word "*unnecessarily*." The work was done in 1850, but whether before or after the passage of the general railroad act, does not appear. This fact, however, is not material; for if the defendants were not authorized to make the alteration, because it impaired the usefulness of the easement, they were authorized to continue the substituted structure, unless it "*unnecessarily*" impaired the easement; and they would have been liable to the devisor of the plaintiffs only for the damages which accrued between the making of the change and the passage of the general railroad act. There was no proof of any such damages.

If, then, the legislature had the power to confer this authority upon the defendants, the plaintiffs cannot complain.

because the acts of the defendants were done under legal sanction; and the only obligation imposed upon them by law, was to do the work in a skillful manner, and not *unnecessarily* to impair the usefulness of the easement.

The question therefore is, whether the acts of the defendants, of which the plaintiffs complain, constitute a taking of their property, within the meaning of that provision of the constitution which requires compensation to be made for private property taken for public use. Whatever views I might entertain of this question, if it were new, I am satisfied it is no longer an open one in this state, but has been settled by repeated adjudications. (*Radcliff's Ex'rs v. The Mayor of Brooklyn*, 4 Comst, 195. *Gould v. Hudson Riv. R. R. Co.*, 2 Seld. 522. *Bellinger v. N. Y. Cent. R. R. Co.*, 23 N. Y. Rep. 42. *People v. Kerr*, 27 *id.* 193. *Corey v. Buffalo, &c. R. R. Co.*, 23 Barb. 482. *Getty v. Hud. Riv. R. R. Co.*, 21 *id.* 617. *Ely v. City of Rochester*, 26 *id.* 133. *Plant v. L. I. R. R. Co.*, 10 *id.* 26. *Bradley v. N. Y. and N. H. R. R. Co.*, 21 Conn. Rep. 294.)

These cases establish the principle that the legislature may rightfully authorize the construction of railroads or other works of a public nature, without requiring compensation to be made to persons whose property has not actually been taken, or appropriated, for the use thereof, but who may nevertheless suffer indirect or consequential damages by the construction of such works.

This case is clearly within the principle stated. What property of the plaintiffs has been taken or appropriated by or for the use of the defendants? None whatever. They may suffer an injury by having the easement or servitude, with which the estate of their grantor and the road-way of the defendants are burdened, impaired. But this is an injury which the property of the plaintiffs suffers in consequence of the construction of a public work, under legal authority, and not the taking of their property. Such loss has always

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been regarded as *damnum absque injuria*, except in cases where, by statute, compensation is required to be made. (*Vide remarks of Denio, J. 23 N. Y. Rep. 48.*)

The judgment must be affirmed, with costs.

[DUTCHESS GENERAL TERM, May 13, 1867. *Scrugham, Lott and Gilbert, Justices.*]

THOMAS FITZGERALD, plaintiff in error *vs.* THE PEOPLE,
defendants in error.

A general verdict, in a criminal case, is equivalent to a special verdict finding all the facts which are well pleaded in the indictment.

Where, upon an indictment charging the prisoner with having committed the crime of murder in the first degree, the jury find a general verdict of guilty, the court is justified in pronouncing a judgment sentencing him to be hung. A common law indictment for murder is good and sufficient, in form, to charge the statutory definition of the crime; i. e. the premeditated design to effect the death of the person killed which the statute makes an indispensable ingredient of the crime, is comprehended in the averment of a willful and felonious killing with malice aforethought.

WRIT OF ERROR to the Westchester oyer and terminer.

The plaintiff in error was indicted for murder. The indictment alleged that the prisoner * * * * "on the second day of August, in the year of our Lord one thousand eight hundred and sixty-six, with force and arms, at the town of Westchester aforesaid, of the county aforesaid, in and upon one Ellen Hicks, in the peace of God and of the said people, then and there being feloniously, willfully, and of malice aforethought, did make an assault; and that said Thomas Fitzgerald, a certain gun (called a musket,) of the value of ten dollars, then and there charged with gunpowder and a leaden bullet, which gun he, the said Thomas Fitzgerald, in both his hands then and there had and held, at and against the said

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Ellen Hicks, then and there feloniously, willfully, and of his malice aforethought, did shoot off and discharge ; and that the said Thomas Fitzgerald, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun, so loaded, to and against the said Ellen Hicks, aforesaid, did then and there feloniously, willfully, and of his malice aforethought, strike, penetrate and wound the said Ellen Hicks in and upon the body of the said Ellen Hicks, near the navel, giving to her, the said Ellen Hicks, then and there, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded to and against the said Ellen Hicks, and by such striking, penetrating and wounding the said Ellen Hicks, as aforesaid, one mortal wound in and through the body of her, the said Ellen Hicks ; of which said mortal wound the said Ellen Hicks did then and there soon after die. * * * * That the said Thomas Fitzgerald, her, the said Ellen Hicks, in the manner and by the means aforesaid, feloniously and of his malice aforethought, did kill and murder ; contrary to the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity."

The prisoner pleaded not guilty. The jury found a general verdict of "guilty," and the court sentenced the prisoner to be hung.

Francis Larkin, for the plaintiff in error. The sentence of the court below is erroneous, for the reason that the indictment only charges the defendant with murder in the second degree.

Murder is divided in two degrees by chapter 197 of Laws of 1862. By section 4 of this chapter, murder in the first degree is punishable with death, and by section 7 of the same chapter, murder in the second degree is punishable by imprisonment in the state prison for any term not less than ten years. By this chapter, § 6, murder in the first degree is defined to be, "First,

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when perpetrated from a premeditated design to effect the death of the person killed, or of any human being ; Second, when perpetrated by any act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual ; Third, when perpetrated in committing the crime of arson in the first degree. Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide as hereinafter provided, or when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree."

The indictment does not charge the killing to have been "perpetrated from a premeditated design to effect the death of the person killed, or of any human being," nor "by any act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, nor in committing the crime of arson in the first degree."

The indictment does not charge the defendant with murder in the second degree. For "such killing, unless it be murder in the first degree or manslaughter, or excusable or justifiable homicide, as hereinafter provided, or when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree." There are a great many cases of murder that will fall under the second degree, where the killing is not by "a person engaged in the commission of any felony."

The words with "malice aforethought" do not help the indictment, nor show in what degree murder is charged therein. The words "feloniously" and "with malice aforethought" must be inserted in the indictment. If either of these is omitted the defendant can only be convicted of manslaughter. (*Barb. Crim. L.* 2d ed. 54. *The People v. Enoch*, 13 *Wend.*

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173.) These words must be used as well in the second degree of murder as the first degree.

The indictment for manslaughter is the same as for murder, omitting the words "of his malice aforethought," wherever they occur, and substituting the word "slay" for the word murder" in the latter part of the indictment. (*Barb. Crim. L. 2d ed. 69.*) The indictment should be framed with sufficient certainty to identify the offense * * * that the court may be able to give judgment and award the punishment which the law prescribes. (*Id. and authorities there cited.*)

The statute clearly requires that the degree of offense should be set forth in the indictment. "Upon an indictment for any offense consisting of different degrees as prescribed in this chapter, the jury may find the accused not guilty of the offense *in the degree charged in the indictment*; and may find such accused person guilty of any degree of such offense inferior to that charged in the indictment." (*3 R. S. 5th ed. 987, § 37. 3 Hill, 93. 3 Park. Cr. R. 182.*) And again, "when by law an offense comprises different degrees, an indictment may contain counts for the different *degrees of the same offense*, or for any of such degrees." (*3 R. S. 5th ed. 1019, § 53. 8 Wend. 211. 3 Park. Crim. Rep. 15.*)

In Indiana, malice being necessary to constitute murder either in the first or second degree, and the distinction between the offenses consisting in the fact that the act was accompanied either *with or without deliberation*, if the indictment simply charge the prisoner with having committed the offense "*feloniously, willfully and of his malice aforethought*," the offense charged will be only murder in the second degree. (*Find v. State, 5 Ind. Rep. 400.*)

An indictment for burglary in the first degree, which does not charge the entry to have been in one of the modes set forth in the statute definition of that degree of the crime, is fatally defective." (*Fellinger v. The People, 15 Abb. 128.*)

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And the court in this case say, "Under the present statute classifying the crime of murder into the first and second degrees, a person might be indicted for murder in the second degree. This would be by omitting the allegation of its being *premeditated*, or being committed in the perpetration of some other offense. If under such an indictment the jury should find the prisoner guilty of murder in the first degree, the conviction could not be sustained, nor would the defect be cured by the verdict." (15 *Abb. Pr.* 134. *Fonts v. The State*, 4 *Green, Iowa*, 500.) This is precisely the case before the court. (See *Dedieu v. The People*, 22 *N. Y. Rep.* 178.)

II. The verdict of the jury is bad. The verdict is simply "guilty," but it don't say of what ; whether of murder in the first or second degree. How could the court say the defendant was guilty of murder in the first or second degree? The statute evidently requires the jury to find what the defendant is guilty of. There is no fact or allegation stated in this indictment that would not have had to be stated charging murder in the second degree. Suppose it contains allegations enough to charge murder in the first degree ; yet the jury have not told us whether they found the defendant guilty of murder in the first or second degree.

John S. Bates, (dist. att'y,) for the people.

By the Court, GILBERT, J. The identical language which the legislature employed, in the Revised Statutes, to define the crime of murder was, with the exception of the change in the third subdivision which is not material to the present case, retained in the amendatory act of 1862, dividing this crime into two degrees, and now constitutes, with the same exception, the definition of murder in the first degree. Under the former statute, it has been repeatedly held that the form of an indictment, at common law, like that upon which the prisoner was tried and convicted, was good and sufficient to

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charge the statutory definition of the crime, i. e. that the premeditated design to effect the death of the person killed, which the statute, applicable to this case, makes an indispensable ingredient of the crime, is comprehended in the averment of a willful and felonious killing with malice aforethought. This has been the rule of law in this state for over thirty years. (*People v. Enoch*, 13 *Wend.* 159. *People v. Clark*, 3 *Seld.* 393.) We are not at liberty to change it. While it prevails, the crime charged in this indictment cannot legally be denominated murder in the second degree. That is defined to be a killing which is *not murder in the first degree*, or manslaughter, or excusable or justifiable homicide, or when perpetrated without any design to effect death, by a person engaged in the commission of any felony. It is not necessary to decide what facts other than those last stated, would constitute murder in the second degree. It is enough, that this indictment sets forth the higher crime.

A general verdict is equivalent to a special verdict, finding all the facts which are well pleaded in the indictment. (*Arch. Pl. and Pr.* 172, 3.)

The jury might have found a special verdict, showing the facts, and required the judgment of the court thereon, (2 *R. S.* 421, § 68 ; *Id.* 735, § 14,) or, if the evidence warranted it, they might have found the prisoner not guilty of murder in the first degree, but guilty of either murder in the second degree or of manslaughter. (2 *R. S.* 702, § 27. *Dedieu v. The People*, 22 *N. Y. Rep.* 178.)

Having found a general verdict upon an indictment charging the prisoner with having committed the crime of murder in the first degree, the court below were right in pronouncing the judgment upon the record. (*Com. v. Gardner*, 11 *Gray*, 438. *White v. Com.* 6 *Binn.* 179. *Com. v. Flanagan*, 7 *Watts & Serg.* 415. *Johnson v. Com.* 12 *Harris*, 586.)

There have been, apparently, conflicting decisions on this subject, in some of the western states, but they proceed on

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peculiar statutes, and ought not, therefore, to influence our determination.

The judgment should be affirmed.

[DUTCHESS GENERAL TERM, May 13, 1867. *Lott, J. F. Barnard and Gilbert*, Justices.]

JANE QUIN vs. GEORGE B. SKINNER.

A will contained substantially the following provisions: "After all my lawful debts are paid and discharged, I give and bequeath unto my executor herein-after appointed, all my estate, real and personal, &c. *in trust* for the following uses and purposes, viz: I direct my executor to pay and apply the whole net income of my estate to the use and support of my mother and wife during the life of my mother, and to permit my wife and mother to use and occupy my farm as their home during the life of my mother. On the death of my mother, I order and direct my executor to pay" certain legacies amounting to \$5,300. "Fifth. I do give, devise and bequeath all the rest, residue and remainder of my said estate to my wife, and to her heirs and assigns forever, which is to be accepted and received in lieu of all dower and right of dower, and I do hereby authorize and empower my said executor to sell and convey my real estate, at any time after the death of my said mother, and to pay over the proceeds thereof to my said wife."

Held, 1. That the trust created by the will did not comprehend the payment of the testator's debts.

2. That when the purpose for which the trust was created ceased, by the death of the testator's mother, and the payment of the legacies, the estate of the trustee ceased also.

3. That the power given by the fifth clause of the will, to the executor to sell, unaccompanied by any trust, except to pay over the proceeds to the wife, could not be upheld upon any application of the principle of equitable conversion; that doctrine never being applied or enforced to defeat, but always to uphold and preserve, estates.

4. That such power was a general power in trust, and was repugnant to the direct and absolute devise to the wife. And that she having remained in possession after the death of the testator; and being in actual possession, claiming under the devise to her, when a conveyance of the premises was made by the executor, in assumed execution of such power; and constantly asserting her title as owner in fee; the principle of the general rule that a power shall not be exercised in derogation of a prior grant by the appointor, applied; notwithstanding the devise and power took effect the same instant.

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5. That the power to sell, in the fifth clause, had no connection with the devise in the first clause; the latter being a trust, while the former required the proceeds to be paid to the wife, which would be in direct contravention of the trust.
 6. That the object of the testator was: (1.) To have his debts immediately paid out of his personalty, and his farm kept for the use of his mother and wife. (2.) To have the objects of the trust fulfilled; after which, (3.) To give the residue of the property to his wife. And that the power of sale could not be allowed to operate to defeat this intention of the testator.
 7. That the object of the power was not a lawful one.
- Accordingly *held* that a conveyance of a portion of the real estate of the testator, executed by the executor and trustee, to a third person, did not operate to defeat the estate of the wife in the premises.

THE plaintiff, now the wife of Hugh R. Quin, was formerly the wife of Benjamin Rhead, of Yonkers, Westchester county. Rhead died in July, 1861, leaving a will containing substantially the following provisions: "*After all my lawful debts are paid and discharged, I give and bequeath unto Joseph H. Palmer, my executor hereinafter appointed, all my estate, real and personal, &c. in trust for the following uses and purposes, viz: I direct my executor to pay and apply the whole net income of my estate to the use and support of my mother and wife during the life of my mother, and to permit my wife and mother to use and occupy my farm as their home during the life of my mother. On the death of my mother, I order and direct my executor to pay*" certain legacies, amounting to \$5,300. "*Fifth. I do give, devise and bequeath all the rest, residue and remainder of my said estate to my wife, and to her heirs and assigns forever, which is to be accepted and received in lieu of all dower and right of dower, and I do hereby authorize and empower my said executor to sell and convey my real estate, at any time after the death of my said mother, and to pay over the proceeds thereof to my said wife.*" The will was admitted to probate July 22, 1861, and the executor named in it duly qualified as such.

The testator's mother died October 17, 1861. After that,

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the plaintiff continued in possession of the farm, claiming it as her own. In April, 1864, she commenced a suit against the executor, in this court, to remove him from office, and compel him to account, and to restrain him from conveying any of the land; pending which suit, the executor executed and delivered to George B. Skinner, the defendant in this suit, a deed for about sixty-eight acres of the farm in question. Under this deed, Skinner, in May, 1865, took forcible possession of the sixty-eight acres, and removed the plaintiff therefrom. The plaintiff sued Skinner in trespass. In defense, Skinner set up title in himself in fee under the executor's deed. The cause was tried before his honor Judge LOTT, in June, 1866, without a jury, and judgment was rendered for the defendant. The plaintiff appealed to the general term.

F. N. Bangs, for the appellant.

R. W. Van Pelt, for the respondent.

By the Court, GILBERT, J. If the conveyance from Mr. Palmer, the executor, to the defendant, vested the latter with the title and right of possession of the premises in question, these facts constitute a bar to this action. The question then is, whether, upon a fair and just construction of the will of Benjamin Rhead, and a proper application of the law governing the case, the executor had an effectual power to make such conveyance. The will first provides for the payment of all the testator's debts, without specifying the manner whereby this is to be done, or creating any particular fund for that purpose. As the personal estate was ample to accomplish this, and leave a surplus to fall into the trust estate next created, it is evident that it was the intention of the testator that the executor should pay his debts in the exercise of the duty and power vested in him by law as executor, and not by virtue of any trust expressed in the will. After the payment of his debts, the testator gave all his

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estate, real and personal, to Mr. Palmer the executor, by name, upon trust, (1.) To apply the whole net income thereof to the use of his mother and his wife, the plaintiff, during the life of the former, (2.) To permit these *cestuis que trust* to use and occupy the farm, of which the premises in question constitute the major part, during the life of his mother, and (3.) On the death of his mother, to pay certain legacies, and to set apart and invest a fund for the ultimate discharge of other legacies. He then, by the fifth clause of the will, devises all the rest and residue of his estate to the plaintiff, her heirs and assigns, forever, in lieu of dower. Finally, he authorizes and empowers his executor to sell and convey his real estate at any time after the death of his mother, and pay over the proceeds thereof to the plaintiff.

If the trust thus created did not comprehend the payment of the testator's debts, it was completely executed before the sale or conveyance to the defendant. The mother had died, and the directions as to legacies had been fulfilled. The estate of Mr. Palmer, the executor, had ceased. For by the express provision of the statute, when the purposes for which an express trust shall have been created shall have ceased, the estate of the trustee shall also cease. (1 R. S. 130, § 67.)

The court below has found that there were debts of the testator unpaid, and that the personal estate actually in the hands of the executor at the time the conveyance to the defendant was made, was insufficient to discharge them, but that the personal estate left by the testator, was more than sufficient to pay all the debts and legacies. As before intimated, we are of the opinion that neither by the terms of the trust, nor by any reasonable or just implication, can the payment of the debts be brought within it.

Having thus disposed of all the will preceding the fifth clause, the question now arises, what is the legal effect of that? It first contains an absolute devise of all the residue of the

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estate of the decedent to the plaintiff in fee simple absolute. It then gives the executor a power to sell, unaccompanied by any trust, except to pay over the proceeds to the plaintiff. Such a power cannot be upheld upon any application of the principle of equitable conversion, for there is no conceivable object to be subserved thereby. The doctrine of equitable conversion is never applied or enforced to defeat, but always to uphold and preserve estates. Besides, in any view of the case, the plaintiff had an election to take the land. (*Reed v. Underhill*, 12 Barb. 113.) It is a general power in trust, and is manifestly repugnant to the direct and absolute devise to the plaintiff. She remained in possession after the death of her husband, the testator; was in actual possession claiming under the devise to her when the conveyance was made to the defendant, and is so still; and she has never relinquished, but on the contrary has always persistently asserted her title as owner in fee. "The general rule," says Ch. Kent, "is, that a power shall not be exercised in derogation of a prior grant by the appointor." The principle of this rule applies here, notwithstanding the devise and power took effect the same instant. (*Duke of Marlborough v. Earl Godolphin*, 1 Eden, 423. *Co. Lit.* 237, a. *Lovett v. Kingsland*, 44 Barb. 570, affirmed *Court of Appeals*. 4 Sand. S. C. Rep. 399. 4 Kent's Com. 319.) Until exercised, the substance of the power was a thing in *posse* rather than in *esse*. Before the actual execution of it, there was no estate or interest, legal or equitable, to support it. When executed, it created an estate, which, if valid, swept away the prior vested estate of the plaintiff against her will, notwithstanding she only was to be benefited, if any benefit should accrue, and, so far as I can see, for no good purpose whatsoever. It is perfectly well settled, and has been ever since the case of *Doe v. Martin*, (4 T. B. 39,) that until the power is exercised, the estate remains vested in those who would take in default of appointment. The effect of an exercise of a power is to divest the estate. (1 R. S. 129, § 59.) If the object of the power had

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been worthy, such as distribution, the protection of infants, or the like, of course the principle would not have been applicable. The defendant's counsel seems to suppose that the testator devised his estate to the executor to sell, and that this vested the legal estate. We have seen that such is not the devise, but that, by its terms, it is a simple creation of an express trust, limited to the payment of legacies and the application of the income to the use of the wife and mother, during the life of the latter. When the purpose for which this trust was created ceased, the estate of the trustee ceased also. (1 *R. S. supra. Hawley v. James*, 5 *Paige*, 458.) And where there is no object for the execution of a power in trust, it of course ceases. (4 *Cr. Dig.* 254. 1 *R. S.* 734, §§ 102, 121. *Hutchings v. Baldwin*, 7 *Bosw.* 241. *Sharpsteen v. Tillou*, 3 *Cowen*, 660.) The rule referred to, therefore, has no application to the case, first, because it is not a general devise to sell, but a trust limited both as to the duration of the estate devised, and to the objects of the trust. A general devise to sell, at common law would pass the estate, but not under our statute. The latter requires that there shall not only be a general devise to the executor to sell, but that it shall also include an authority to receive the rents and profits. (1 *R. S.* 729, § 56. 4 *Kent's Com.* 321. *Germond v. Jones*, 2 *Hill*, 573.)

Nor can the devise to the executor be made to operate in the way suggested, even in connection with the subsequent power to sell. For a devise that an executor may or shall sell lands gives him only a naked power. (*Sug. Pow.* 8th ed. 112.) Thus in *Doe v. Shotton*, (8 *Ad. & El.* 905,) there was a devise to a testator's wife during her life, and after her decease, "my will is, that my freehold shall then be sold by my executors in trust, and all the money be divided between all my children or their heirs, by my said executors." Held by the Court of King's Bench, Lord Denman, Ch. J. delivering the opinion, that the executors took a power, not a legal estate. And if the power was auxiliary to the trust it necessarily fell

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with it. But it is clear that the power to sell, in the fifth clause, has no connection with the devise in the first clause. The latter is a trust, while the former requires the proceeds to be paid to the wife, which would be in direct contravention of the trust. It is our duty to give effect to every part of the will, if possible. If this cannot be done, then it is equally our duty to reject what is repugnant to the general intention, or to any obvious particular intention of the testator. (1 *R. S.* 748, § 2. *Parks v. Parks*, 9 *Paige*, 116.) The analysis of the will, we think, has shown that it was not the intention of the testator to pass his interest to the executor. The general scheme manifested by the will proves the same. The object of the testator was clear and simple, namely (1.) To have his debts immediately paid out of his personalty, and his farm kept for the use of his mother and wife, and (2.) To have the few and simple objects of the trust fulfilled, after which, (3.) To give the residue of his property to his wife. The power of sale ought not, upon any principle of law or justice, and cannot be allowed, to operate to defeat this intention of the testator so clearly manifested in the will.

We are also of opinion, that effect could not be given to such a power without contravening the policy of the law as expressed in the 47th and 49th sections of the statute of uses and trusts. (1 *R. S.* 727.) Section 47 provides, that every person who by virtue of any grant, assignment or devise, now is, or hereafter shall be, entitled to the actual possession of lands and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest. And section 49 requires every disposition of lands to be made directly to the *beneficial owner*. These provisions have completely extirpated the class of formal trusts; the object of the legislature being to prevent frauds. "Formal or passive trusts," say the revisers in their notes, (3 *R. S.* 2d. ed. 583,) "separate the legal and equita-

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ble estate for no purpose that the law ought to sanction. They answer no end whatever but to facilitate fraud."

To uphold a naked power in trust like that in this case, would provide an easy and effectual method whereby the very evils which the legislature intended to prevent by the enactments cited, might be accomplished. Such a power is deemed, in equity, a trust for the benefit of the person who is to take the fruits of the exercise thereof. (*Hunt v. Rousmaniere's admr's*, 8 *Wheat.* 207. 1 *R. S.* 734, § 96.) Upon what principle can courts of justice allow a man to do that indirectly, by means of a power in trust, which the statute does not expressly authorize him to do in that way, but does, in terms, prohibit him from doing directly in any way? (*See* 1 *R. S.* 732, § 74.) I have not been able to discover any. On the contrary, I think it is as much their duty scrupulously to guard against attempted violations of the *policy* of the law as declared in the statutes, as to annul acts which are expressly prohibited.

The terms of this power, it is true, are within the definition of a general power in trust. (1 *R. S.* 732, §§ 77, 94.) But the statute relative to powers does not enumerate or define the *objects* for which powers may lawfully be created. There can be no doubt, however, that formal powers in trust may be created which would be illegal and void. For example, a power, the execution of which should be directed after the lapse of a period beyond two lives in being; or a power to sell and convey to an alien. Such powers would be void, because the objects of them would be unlawful, notwithstanding they should be expressed in language bringing them within the definition of a power in trust. (*Sug. Pow. ch.* 3, § 3; *ch.* 8, § 1. *Beekman v. Bonsor*, 23 *N. Y. Rep.* 317.) For the reasons stated, we think the object of this power was not a lawful one. (*See Downing v. Marshall*, 23 *N. Y. Rep.* 380. *Belmont v. O'Brien*, 12 *id.* 403. *N. Y. Dry Dock Co. v. Stillman*, 30 *id.* 194.)

The case does not depend on the question whether the

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defendant is a *bona fide* purchaser. But in the eye of the law he is not. (*Williamson v. Brown*, 15 N. Y. Rep. 354.)

The judgment must be reversed, and a new trial granted, costs to abide the event.

[DUTCHESS GENERAL TERM, May 13, 1867. *Lott, J. F. Barnard* and *Gilbert*, Justices.]

49 136
57h 106

THE PEOPLE *ex rel.* Morris Reynolds and others *vs.* THE
CITY OF BROOKLYN.

After commissioners to estimate the expense and assess the damages of widening a street in a city have been appointed, in pursuance of a special act of the legislature, and have made their final report of estimate and assessment, which has been confirmed by the county court, and the proceedings have been reversed, on certiorari, by judgments of the Supreme Court, such commissioners have no power to file another report of estimate and assessment, in the same matter, their appointment being annulled by such judgments, and the commissioners being thenceforth *functi officio*. (J. F. BARNARD, J. dissented.)

The office of a certiorari is to bring up the record of the proceedings sought to be reviewed; and it is properly directed to the officer or body having the legal custody thereof.

Where the return of a city corporation to a writ of certiorari to remove proceedings for the widening of a street shows that the report of the commissioners, annexed thereto, contains a recital of the proceedings by which they were appointed; or a certified copy of such proceedings is appended thereto; the petition for the appointment of commissioners, and the order appointing them, form constituent parts of a single record, which is legally in the custody of the city corporation; and they are, by the return of such corporation, brought before the court, as fully and directly as any other part of the same record.

Any error in the direction of a writ of certiorari, or in the return thereto, must be corrected by motion. All objection on the ground of such irregularities, is waived by submitting to a hearing on its merits.

BY a special act of the legislature, Main street, in the city of Brooklyn, was widened, and the county court of Kings county was authorized to appoint three commissioners to

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estimate the expense and assess the damages thereof. The laws in force, in relation to opening and widening streets in the city of Brooklyn, were made applicable to the proceedings of such commissioners. (*Laws of 1861, ch. 191, p. 484.*) In pursuance of the provisions of such act, three commissioners were appointed by the said county court, who entered upon the duties of their appointment, and made their final estimate and assessment, which, after being amended by direction of the court, was confirmed on the 5th day of October, 1863, by the said county court. Two writs of certiorari were sued out in this court, to review, for alleged errors, the proceedings under said act of 1861, and two several judgments were entered, one on the 13th of December, 1864, and the other on the 13th of January, 1865, reversing the proceedings in the matter of widening Main street. On the day following the entry of the last judgment, viz. on the 14th of January, 1865, the same commissioners filed another report of estimate and assessment, which was presented for confirmation, and confirmed by this court on the 6th of March, 1865.

A certiorari was then brought to review these proceedings, and to quash them, on the ground that the commissioners were without further jurisdiction in the matter, after the confirmation of their first report.

Henry C. Murphy, for the relators. I. This court, in reviewing by virtue of its general jurisdiction, on *certiorari*, the proceedings of an inferior tribunal, does not render judgment to correct any error of such tribunal. It either affirms or quashes the proceedings in such case entirely, or, where the proceedings are, in some of their parts, independent of each other, it may affirm a part and quash a part, but in either case the judgment is final, and the proceedings stand as left by this court, wholly quashed or wholly affirmed, or partly quashed or partly affirmed. The proceedings cannot be altered or amended by this court, and much less by the inferior court, whose proceedings are reviewed. (*Common-*

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wealth v. Blue Hill, &c. 5 Mass. R. 420. *Commonwealth v. West Boston Bridge*, 13 Pick. 196.)

II. The proceedings reviewed cannot go back to the inferior tribunal. It is not in the power of this court to send them back ; because, having once made its decision, the inferior tribunal is *functus officio*, and can take no further cognizance of them. When, therefore, the commissioners for widening Main street made their report, and that report was confirmed, they were discharged of any further power in the premises, and had no longer any existence as such. They were created for a special purpose, and that was accomplished. (*Baldwin v. Calkins*, 10 Wend. 179.)

III. The power of the courts to send back the report of commissioners of estimate and assessment, in proceedings like those of Main street, is a statutory provision, and applies only upon a motion to confirm the report, and before confirmation. (*Laws of 1861, ch. 191, § 2, pp. 485, 6. Act to widen Main street, Laws of 1854, ch. 384, title 4, § 13, p. 866. Charter of Brooklyn.*)

IV. By the judgments of this court, on the former certioraris, the proceedings in widening Main street were reversed, without qualification. In order to carry out the improvement, it became necessary to commence *de novo*, for the appointment of new commissioners under the law of 1861. (*Baldwin v. Calkins, ut supra.*)

V. The commissioners who made the first assessment, in assuming to act in making a new assessment, without an appointment for that purpose, usurped a power which they did not possess, and their proceedings are utterly without jurisdiction and void.

John G. Schumaker, for the defendant. I. This is a common law certiorari, addressed to the city of Brooklyn. It does not bring before this court the proceedings in the county court, which resulted in the appointment of the commissioners. It appears that a petition was presented by persons alleging

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themselves to be interested in the improvement, asking the appointment of commissioners, and that the court determined that these persons were so interested, and granted the order asked for. This determination is conclusive in this proceeding. (*People v. Lawrence*, 36 Barb. 177, 184.)

II. If the question of the sufficiency of the petition were before the court, the allegations which it contains are sufficient. The petitioners state, in the language of the act, (*Laws of 1861*, p. 435,) that they are interested in the improvement. This is not a question of pleading, but of substantial conformity to the act. Certainly under this averment, the petitioners' interest could be proved.

III. The provisions of the charter of Brooklyn, requiring the common council to prescribe a district of assessment, are totally inapplicable to this case. They only apply where the common council are required to hear the parties interested, and then to determine whether the improvement shall be made. Here the legislature have determined, as the first step, that the improvement shall be made.

IV. The same answer exists to the other objection to this proceeding, based upon the requirements of the charter of Brooklyn in regard to local improvements. These provisions are only applicable to this case after the commissioners are appointed, and then only so far as consistent with the act itself.

By the Court, GILBERT, J. The principal question presented in this case relates to the effect of the judgments of this court heretofore rendered, upon the returns to two several writs of certiorari, issued for the purpose of reviewing the proceedings, had under the act of April 13, 1861, (*Session Laws of 1861*, p. 485,) to estimate the expense of widening Main street, in the city of Brooklyn, and to assess on the property benefited by such improvement, the damages accruing therefrom. These writs were directed to the city of Brooklyn, and commanded them to return "all the proceedings

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had, together with all reports, petitions, objections, affidavits, and all orders, matters, and things touching, or relating to the assessment, and proceedings had and taken in the matter of widening Main street, etc. and all orders made therein by the county court of Kings county." The said respondent, having in obedience to these writs returned a record containing all such proceedings, including the petition to said county court for the appointment of commissioners, and the order of said court, appointing them, the cases were brought to a hearing and judgment, in this court at general term. In one case the judgment, after reciting that it had been brought on for argument, "upon certiorari and return thereto, bringing up *the proceedings had in relation to the widening of Main street, under the act aforesaid,*" orders and adjudges, "*that said proceedings be reversed.*" In the other case, the judgment contains the same recital, and then orders and adjudges that "*all said proceedings be reversed.*" The said commissioners disregarded these judgments, and immediately after the same were entered, without having received any fresh authority, but acting solely under the aforesaid order of the county court appointing them, proceeded to make a new estimate and assessment; and their report thereof having been confirmed by this court at special term, the writ before us was sued out, directed to the city of Brooklyn, commanding them to return "the petition on which said commissioners were appointed, and the order appointing them," together with the subsequent proceedings, referring particularly thereto. The return contains the same petition, and the same order appointing them, as were returned on the former occasion, together with their new report, and the papers relating to its confirmation.

1. Had these commissioners, then, power to make the estimate and assessment under review, or was their appointment annulled by the judgments in the former cases? There can be no doubt that these judgments, in terms, embrace the proceedings, whereby the commissioners were appointed, and

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explicitly reverse the same. The proceedings reversed are, *all those had in relation to the widening of Main street, under the act of 1861*. This language is sweeping and comprehensive; and unless its legal effect can be restricted, or limited by something *aliunde*, each and every proceeding taken in relation to the improvement in question, prior to the rendition of such judgments, was vacated and annulled. (*See 2 Seld. 320.*) The opinion of the court, delivered by Mr. Justice BARNARD, upon the rendering of those judgments, states that the only error found in the proceedings was the assessment of the ferry franchise of the city of New York; and that for this error, the report should be wholly set aside. Upon this it is contended, that the judgments actually rendered by the court were limited to the setting aside of the report of the commissioners only, and did not affect the proceedings previously had; and that, therefore, the latter proceedings remained in force, and the power thereby conferred upon the commissioners continued, and authorized them to make the new estimate and assessment. We cannot assent to this proposition.

1. The judgments were in full force, and even if they were erroneous, neither the commissioners, nor the officers of the city of Brooklyn, had any right to disregard them. If a judgment be entered in such a manner as not to embody the actual decision of the court, the remedy of any aggrieved party is by motion to correct the mistake; and if it be correctly entered, but be erroneous in law, the only remedy is by appeal. It will never do to allow the validity of judgments to be impeached in any other mode. For, as was said by JOHNSON, J. in *The People v. Sturtevant*, (*5 Seld. 266*,) "The principle is of universal force, that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous;" and the enforcement of this principle, in the present case, becomes especially necessary, for the reason that the judgments under consideration would be a complete bar to any action or proceeding for enforcing

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payment of any assessment, imposed by the commissioners in their last report, even if we should quash the certiorari before us. This would follow upon the familiar principle, already alluded to, that a judgment continues in full force and effect, and binds all parties and privies, until reversed by a direct proceeding for that purpose. The benefit of these judgments was not confined to the relators respectively, but being in favor of the people, enured to all persons assessed; and a subsequent inconsistent judgment would not have the effect to destroy rights acquired under them. The same court frequently, (perhaps too frequently,) reverses its previous decisions; but such reversals never have had, and without a statutory amendment never will have, the effect to restore rights, lost by the decisions reversed, unless an appeal be taken from the judgments entered thereon.

2. The decision actually made and entered in the minutes of the court, in each case, is in these words, "proceedings reversed with costs." Objections were raised in these cases, which if sustained by the court, necessarily involved a determination invalidating *all* the proceedings embraced in the record. We do not deem it suitable to this inquiry, to ascertain whether these objections were well founded in law or not; but we think the minutes of the court furnish better evidence that a majority of the judges, who composed the court, concurred in the judgments entered, than the opinion delivered furnishes, that they did not concur therein.

II. It is also said that notwithstanding the record contained in the returns to the former writs of certiorari embraced the proceeding in the county court which resulted in the appointment of commissioners, and that although specific objections were taken to the validity of those proceedings, yet as those writs were directed to the city of Brooklyn, they did not bring before this court the proceedings in the county court, and therefore the judgments did not affect the latter. We think this view is erroneous. The act of 1861, before referred to, provides that after the appointment of the com-

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missioners shall have been made, "all laws then in force relating to the widening of streets in the city of Brooklyn, not inconsistent with the provisions of that act, shall apply to the proceedings of said commissioners." Among the laws thus adopted, was this provision of the charter of Brooklyn, viz. "after the reports of the commissioners shall be confirmed, the said reports shall be delivered to the common council of said city." (*Laws 1854, p. 866, § 15.*) The office of a certiorari is to bring up the record of the proceeding sought to be reviewed; and it is properly directed to the officer, or body, having the legal custody thereof. The record, in cases like those under consideration, would not be complete unless it showed the authority of the commissioners. Hence, in practice, the report of the commissioners contains a recital of the proceedings whereby they were appointed, or a certified copy of such proceedings is appended thereto. No express statute is necessary to legalize such a practice. It will be upheld, because it is right, and appropriate in itself. The returns show that it was pursued in the instances before us; and therefore the petition for the appointment of commissioners, and the order appointing them, formed constituent parts of a single record, which was legally in the custody of the city corporation; and by its return was brought before the court, as fully and directly as any other part of the same record. (*Daniel v. Phillips, 4 T. R. 499.*) Another answer to this suggestion is, that it comes too late. Any error in the direction of the writ, or in the return thereto, must be corrected by motion. All objection on the ground of such irregularities, is waived, by submitting to a hearing on the merits.

We do not intend to intimate any thing contrary to that which the court held on this subject in the cases of *People ex rel. Crowell v. Lawrence*, (36 Barb. 177,) and *People ex rel. Porter v. Rochester*, (21 id. 656.) Conceding that the order of the county court appointing the commissioners was conclusive, yet the case in 36 Barb. is a direct authority for the

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proposition that such order and the petition on which it was founded were properly before this court, upon the return.

III. We are also of the opinion that, independently of the questions before discussed, the commissioners were *functi officio*, at the time they made their last report. The whole proceeding is regulated by statute. (*Laws 1854, p. 866.*) There is no provision authorizing the sending back of the commissioners' report, after the same shall have been confirmed by the court. If the general power of the court embraces such an authority, (a question which we have not considered,) it has not been exercised. The first report of these commissioners was wholly set aside and annulled. After this they could not entertain jurisdiction of the matter again, without new proceedings. (*Baldwin v. Calkins, 10 Wend. 181*)

The proceedings under review must be reversed, with costs.

J. F. BARNARD, J. (dissenting.) The commissioners to estimate the expenses of widening Main street in the city of Brooklyn, and to assess the damages therefrom on such property as they thought benefited thereby, according to the provisions of chapter 131 of Session Laws of 1861, were regularly and legally appointed. This was decided in *The People ex rel. Wetmore v. The City of Brooklyn*; and although the report was reversed for the reason that they had improperly assessed for benefits a ferry franchise, the reversal had no such result as the removal of the commissioners so appointed. It destroyed the assessment; and still left the commission to which the law sent the estimate and assessment for this improvement. An entire new report was necessary, but it was to be made by this commission. The legislature widened this street by law. It directed the county court of Kings county, or the special term of the Supreme Court, to appoint three disinterested persons as commissioners, upon the application of any person interested in the improvement. All other laws in reference to opening streets in Brooklyn were made applicable to the proceedings to be taken by this commission.

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The law widening Main street provided for the appointment of but one set of commissioners, by its own provisions. According to the provisions of other laws then and now existing, a new commission is provided for only in case the county court, or the special term of this court, upon application to confirm their report, refuse, and then they may send it back for correction, either to the same or other commissioners. Until the commissioners are removed by one of these courts, the appointment must stand. No application for a new appointment can be made while it does stand, either to the county court or the Supreme Court. The power has been exercised. The legislative act is not to be annulled because a mistake has been made by the commissioners in a principle of their assessment. They are not *functi officio* until they have made the assessment according to law, which they have been appointed to make. This being the only question raised by the writ of certiorari, I think the report of the commissioners should be affirmed, with costs.

Proceedings reversed.

[DUTCHESS GENERAL TERM, May 13, 1867. *Sorugham, Gilbert and J. F. Barnard*, Justices.]

 OSINCUP vs. NICHOLS.

Although it is unnecessary to prove that the owner of a dog had notice that his dog was vicious, to render him liable for the *value* of any sheep or lamb *killed or wounded* by such dog, the rule is different in respect to any *other* injury such dog may have done to the sheep or lambs of another.

To entitle the owner of sheep or lambs to recover of the owner of a dog for any damage done by such dog to such sheep or lambs, aside from killing or wounding them, it is necessary for the plaintiff to prove that the defendant had notice, or knowledge, of the vicious propensity of his dog.

The owner of a dog is liable for the full value of each sheep or lamb *wounded* by his dog. To entitle the owner of the sheep or lambs to recover their value, it is not necessary for him to show that they died of their wounds.

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On appeal to the county court from a judgment of a justice's court, the county court should disregard errors of the justice not affecting the merits, and give judgment according to the justice of the case.

THIS action was brought, before a justice of the peace, in July, 1865. The plaintiff complained that on or about the 28th day of May, 1865, the defendant's dog bit and worried, injured and damaged the plaintiff's sheep, causing the death of two, within two days; and the plaintiff claimed \$50 damage. The defendant denied the complaint. The action was tried by a jury, who rendered a verdict in favor of the plaintiff, for \$13, for which the justice rendered judgment against the defendant, with costs. The Broome county court reversed the judgment, and gave judgment in favor of the defendant, for costs. The plaintiff appealed from the judgment of the county court, to this court.

O. W. Chapman, for the plaintiff.

Wm. Bassett, for the defendant.

By the Court, BALCOM, J. It was unnecessary for the plaintiff to prove that the defendant had notice or knowledge that his dog was vicious, to render him liable for the *value* of any sheep or lamb of the plaintiff that was *killed* or *wounded* by such dog. (1 R. S. 704, § 9.) But the rule is different in respect to any *other* injury the defendant's dog may have done to the plaintiff's sheep or lambs. It was necessary for the plaintiff to prove that the defendant had notice or knowledge of the vicious propensity of his dog, to entitle the plaintiff to recover of the defendant any damage his dog did to the plaintiff's sheep or lambs aside from killing or wounding them. (*Auchmuty v. Ham*, 1 Denio, 495.) There was no allegation in the complaint that the dog broke and entered the plaintiff's close and there did the injury to his sheep and lambs. The question therefore is not in the case whether if such an allegation had been in the complaint and

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the proof had been that the dog did the mischief complained of, upon the plaintiff's land, a recovery could have been had for injuries the dog did to the plaintiff's sheep and lambs, by merely chasing and worrying them, without killing or wounding them. (*See Van Leuven v. Lyke*, 1 Comst. 515.)

The proof showed that the defendant's dog bit and wounded six of the plaintiff's sheep, and that two or three of them died. And it seems that the sheep that were wounded had six lambs. The plaintiff was a witness in his own behalf, and while testifying for himself he was asked, how much less the six lambs were worth at the time of the trial than they would have been if the mothers had not been injured by the dog; which question was objected to, on the ground that it was improper, because it had nothing to do with the case, and the plaintiff could not give evidence as to consequential damages, in the action. The justice overruled the objection, and the defendant excepted. The plaintiff answered: "Four are worth less \$8." It is clear, as the case stood, that this question should have been rejected, and that the justice erred in permitting the plaintiff to answer it. But we are of the opinion the case is such that the county court ought not to have reversed the judgment for this error of the justice. The evidence was undisputed that the value of the six sheep that were either killed or wounded by the defendant's dog, exceeded the amount of the verdict of the jury. The plaintiff testified as to their value, as follows: "The one that the defendant thought not bitten was worth \$3. The one missing with black lamb, \$3. The one that died Wednesday, \$4. There were three more bitten that are worth less \$6." The plaintiff was corroborated upon this subject by the witness Batcher; and no witness testified that the sheep were worth any less than the above sums, or gave any evidence that would authorize the jury to find the plaintiff's estimate of his damages was inaccurate. The defendant was liable for the full value of each sheep or lamb his dog wounded. It was unnecessary for the plaintiff

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to show they died of their wounds, to entitle him to recover their value. The statute is: "The owner or possessor of any dog that shall kill *or wound* any sheep or lamb shall be liable for *the value* of such sheep or lamb to the owner thereof, without proving notice to the owner or possessor of such dog, or knowledge by him, that his dog was mischievous or disposed to kill sheep." (1 R. S. 704, § 9.) The aggregate value of the plaintiff's sheep, that were either killed or wounded by the defendant's dog, was at least \$16, and he only recovered \$13, damages. It is therefore clear that the defendant was not prejudiced in the least by erroneous evidence the justice permitted the plaintiff to give respecting the injury to the six lambs in consequence of their mothers being wounded by the dog. The error of the justice was one that did not affect the merits, and the county court should have disregarded it, and given judgment according to the justice of the case. (Code, § 366.)

For these reasons we are of the opinion the judgment of the county court should be reversed, and that of the justice affirmed, with costs.

So decided.

[BROOME GENERAL TERM, May 14, 1867. *Mason, Balcom and Boardman, Justices.*]

49 148
58h 361

49 148
61h 421

49 148
84h 310

CURTIS vs. THE AVON, GENESEE AND MOUNT MORRIS RAILROAD COMPANY.

A service of a summons on a director of a corporation is regular, and will give the court complete jurisdiction of the parties.

An agent of a railroad corporation, having charge of a depot, and the freight therein, is the proper person to inquire of, respecting lost baggage; and his answer is part of the evidence of the loss, and admissible, as *res gesta*.

So, in regard to an arrangement between a passenger and the baggage master, at a station, that the baggage of the former may remain at the depot, and that the latter will see to it until it can be sent for.

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In an action by a passenger, against a railroad company, to recover for lost baggage, evidence to show that the passenger was lame, and unable to take charge of his baggage, personally, is admissible, as tending to prove that he was guilty of no negligence in not calling for, and taking charge of, his baggage, upon the arrival at his place of destination; and as furnishing a good reason for making an arrangement with the agents of the railroad company that it should remain in the custody of the company until called for.

Where a passenger, on arriving at his destination, neglects to look after his baggage, and negligently leaves it, without any arrangement that the carrier shall retain it for him, and it is lost while thus situated, without fault on the part of the carrier, the latter is not liable.

But where there is no delivery of baggage carried upon a railroad, to the passenger, and no neglect to claim it, or inquire for it, but on the contrary the company's agents agree to retain it until it can be sent for, the company's liability as a common carrier continues after the baggage is taken from the cars, and until it is delivered or tendered to the owner.

THIS action was commenced before a justice of the peace of Livingston county, to recover of the defendant the value of certain baggage belonging to the plaintiff delivered to the defendant for transportation as a carrier, and claimed to have been lost, through its negligence. The facts were these: The plaintiff's minor son, a cripple, unable to carry his baggage, was placed on board the defendants' cars at Avon, and his fare paid to Mount Morris; on arriving at that place, the son informed the baggage man that he could not take away his baggage until he could go home, and his father would come after it. The plaintiff was not at home when his son arrived, on Saturday afternoon, but came home between that time and Monday, and on Monday morning went to the station for the baggage and it was not to be found. The keeper of the station house had put the baggage into the room occupied by passengers, where they usually left baggage and allowed any person to take baggage away. The doors were open in the day time, and the station man was absent, occasionally, from the room. There was a warehouse attached to the depot, but the baggage was not put into the warehouse. On the trial the plaintiff was called and sworn as a witness in his own behalf, and testified as follows: "I reside in Mt. Morris.

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I had a son at Avon last fall on account of his health. He went on the defendants' road to Avon. They run trains regularly from Mount Morris to Avon and back every day. My son is 13 years of age. He came from Avon home the latter part of September last. He had baggage ; I was not at home when he returned. I came home soon after, and went to the railroad depot. I here saw Mr. Booth. He is an agent at the depot for the company, and takes charge of the station. There is a building at the station, called the depot, at Mount Morris ; this is what he is in charge of for the company." The plaintiff here proposed to show what was said by Booth to witness, and what took place in relation to this baggage. The defendants objected to the plaintiff proving what was said by Booth to the plaintiff in relation to this baggage. Objection overruled by the court and the witness was allowed to answer. The defendants excepted. Answer. "I was there on the Monday following my son's return home, I think. I asked Booth for the baggage ; he said he did not know any thing about it ; we then went and looked for it in the wareroom ; told him what it was done up in ; he then said he remembered it, saw it when it went down to Avon, but said he could not find it ; told me he never had had it." The plaintiff here proposed to prove by the witness that his minor son is a cripple and unable to have taken away his baggage. Objected to as immaterial. Objection overruled by the court and evidence admitted. Defendants excepted.

H. H. Curtis, the plaintiff's son testified that after his arrival at the Mount Morris depot he had a conversation with William Leming, the baggage man, about his baggage, and asked him if he would not see to his baggage ; and that Leming said he would. This testimony was objected to, but admitted by the court.

The only proof of service of the summons was by the constable, who certified that he personally served the same on

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George S. Whitney, one of the directors of the Avon, Genesee and Mt. Morris Railroad Company at a specified date.

The plaintiff recovered a judgment for \$45 and costs. On appeal to the county court of Livingston county, the judgment of the justice was affirmed, and the defendants appealed to this court, from the judgment of the county court.

R. P. Wisner, for the appellant. I. The return of the constable conferred no jurisdiction upon the justice who rendered the judgment. The objection was made in due season, and the defendant lost nothing by defending. (11 *Barb.* 309. 9 *id.* 60.)

II. The justice erred in allowing evidence of the conversations had with the witnesses, Booth and Leming. It was hearsay. (24 *Barb.* 414.) These persons were both competent witnesses, and should have been called. (19 *Wend.* 232.)

III. The evidence that the condition of the boy having charge of the baggage was such that he could not take it away, was improperly received. The defendant's rights could not be affected by it. This evidence was the controlling point before the justice. (19 *Wend.* 232. 9 *Barb.* 624. 11 *How.* 95.)

IV. The witness, Burton, was allowed to give his opinion of the value of a part of the property, without having any knowledge of it.

V. The undertaking of the company was performed and they were discharged from liability. (34 *N. Y. Rep.* 548.)

A. M. Bingham, for the respondent. I. The first point raised in the notice of appeal in this case, is, that the court did not acquire jurisdiction, by the return of the constable. A summons may be served on a corporation by serving it on a director. (*Code*, § 134, *subd.* 1.) And it is provided by *chap.* 282, *Laws of 1854*, that railroad corporations shall designate some person in each county on whom justices' court process may be served, and "service on such person shall be

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as valid as though made on a director." This act does not interfere with service upon a director where such service can be made.

II. The return of the constable, shows personal service on a director, and such return is prima facie evidence of the service, and of the official capacity of the director. (*New York and Erie Railroad Co. v. Purdy*, 18 Barb. 574. *Wheeler v. N. Y. and Harlem Railroad Co.*, 24 id. 414.)

III. The second and fourth points are objections to evidence of the plaintiff's conversations with Booth, the defendants' agent, who took the baggage from the platform into the baggage room. The conversations allowed by the court were in reference to the loss of the baggage, and occurred at the time the plaintiff called for his baggage. This evidence was competent as a part of the *res gestæ*. (*McCotter v. Hooker*, 8 N. Y. Rep. 497.)

IV. The third and fifth points in the appeal, are objections to the evidence allowing the plaintiff to prove that his son was not able to carry his baggage with him from the depot, in consequence of being crippled, and was obliged to leave it until his father could come after it. This evidence was competent. The plaintiff had a reasonable time to get away his baggage, and what is a reasonable time, will depend upon the circumstances of each particular case, and is a question of fact. This evidence was competent to show that there was no neglect on the part of the son, in going away and leaving his baggage until he could find his father and have him come after it. He informed the agent, also, that he could not carry it away, who agreed to see it taken care of until the father could come after it. This I do not conceive added to their duties anything new, as it was nothing but an agreement to do what they were already bound to do; neither did it relieve the company from any responsibility, as was expressly adjudged in *Fenner v. Buffalo and State Line Railroad Co.*, (46 Barb. 103.)

V. The last point by the notice of appeal is "that the

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judgment is not in accordance with the law as applied to the facts proven." This point requires an examination of the whole case. There is no dispute that the goods in question were taken on board the train at Avon as baggage, and brought to Mount Morris on Saturday afternoon, and when the plaintiff called for them Monday morning, they could not be found. The defendant claimed in the court below, that taking the goods from the car and landing them on the platform at the depot, constituted a delivery, but it has frequently been held otherwise. (*Price v. Powell*, 3 N. Y. Rep. 322. *Ostrander v. Brown*, 15 John. 39. *Cole v. Goodwin*, 19 Wend. 251. *Powell v. Myers*, 26 id. 591.) The owner of baggage has a reasonable time to get it away after its arrival at the place of destination, and what is a reasonable time will depend upon the circumstances of each case, and until such reasonable time has elapsed, the company are responsible. (*Price v. Powell*, *supra*. *Gould v. Chapin*, 20 N. Y. Rep. 259, 266. *Owners of the Mary Washington v. Ayres*, Am. Law Reg. N. S. vol. 5, p. 692.) What is a reasonable time, is a question of fact, upon which the court will not disturb the finding of the justice. (*Merrill v. Grinnell*, 30 N. Y. Rep. 594. 1 Daly, 197.)

VI. The company cannot change their character as common carriers, or relieve themselves from liability as such, until they have first given a reasonable time to take away the goods; and secondly, if not called for in a reasonable time, they must have been safely deposited with some responsible warehouseman, before the defendants are discharged as common carriers. (*Gould v. Chapin*, 20 N. Y. Rep. 259, 267. *Michaels v. New York Central Railroad Co.*, 30 id. 564. *Mary Washington v. Ayres*, 5 Am. Law Reg. N. S. 692.)

By the Court, JOHNSON, J. The summons was properly served, as appears by the return, and the justice acquired thereby complete jurisdiction of the parties. A service on a

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director of a corporation is regular. (*Code*, § 134. *Wheeler v. The New York and Harlem Railroad Co.* 24 Barb. 414. *The New York and Erie Railroad Co. v. Purdy*, 18 id. 574.)

The objection to the inquiry made of Booth, and his answer, was not well taken. Booth was the defendants' agent, and had charge of the depot and freight therein, at Mount Morris, when the baggage in question was lost. He was the proper person to inquire of, and his answer is part of the evidence of the loss. It is clearly *res gestæ*. So in regard to the arrangement between the plaintiff's son and Leming, the baggage master, that the baggage might remain at the depot, and he would see to it till it could be sent for. (*McCotter v. Hooker*, 4 Seld. 497.) But were this otherwise, the error would be cured, as both these agents were used as witnesses on behalf of the defendant, and testified to the same facts precisely, and to nothing different in any essential particular.

The evidence to show that the plaintiff's son was lame and unable to take charge of his baggage personally, was properly received. It tended to prove that he was guilty of no negligence in not calling for, and taking charge of, his baggage upon the arrival at his place of destination; and, also, a good reason for making the arrangement with the defendants' agents, that it should remain in the defendants' custody until called for.

Upon the merits, the defendants' liability was correctly determined. The case of *Roth v. Buff. and State Line R. R.* (34 N. Y. Rep. 548,) settles the rule that where a passenger on arriving at his destination, neglects to look after his baggage, and negligently leaves it, without any arrangement that the carrier shall retain it for him, and it is lost while thus situated, without fault on the part of the carrier, he is not liable. In the present case, there was no delivery of the baggage by the defendant, and no neglect to claim it, or to inquire for it, by the plaintiff's son. On the contrary, it was retained by the defendant on request, until it could be sent for. In this respect, the case is nearly identical, in its facts,

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with that of *Powell v. Myers*, (26 *Wend.* 591,) which is not overruled in *Roth v. State Line Railroad Co.* (*supra*,) but is on the contrary conceded to be sound law. (See also *Hollister v. Nowlen*, 19 *Wend.* 234, and *Cole v. Goodwin*, *Id.* 251.) Upon the undisputed facts of the case, the defendant's liability, as common carrier of the baggage in question, continued after such baggage was taken from the cars, and until it was delivered or tendered to the owner. The judgment must, therefore, be affirmed.

[MONROE GENERAL TERM, June 8, 1867. *Wells, E. D. Smith and Johnson*, Justices.]

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THE FARMERS AND MECHANICS' NATIONAL BANK OF ROCHESTER, *vs.* JAMES H. GREGORY and CHARLOTTE U. GREGORY, his wife.

Our recent statutes for 'the better protection of the separate property of married women have no relation to, or effect upon, real estate conveyed to husband and wife jointly.

In such a case the wife has no separate estate, but is seised, with her husband, of the entirety; neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate.

They hold thus not as joint tenants, or as tenants in common, but as tenants by entireties; and the same words of conveyance which would make two other persons joint tenants, will make the husband and wife tenants of the entirety.

When the estate thus held by them is voluntarily converted into money, the same belongs to the husband, exclusively, in virtue of his marital rights.

And no rule of equity will give the wife the entire amount, as her separate property, to the exclusion of the rights of the husband and of his creditors. In a case where there never was any separate estate or right in the wife, neither the statutes, nor the rules of equity, are sufficient to enable her to appropriate the entire property to herself, to the exclusion of the husband's creditors, although they became such during the joint ownership.

APPPEAL from a judgment entered upon the report of a referee. The action was brought by the plaintiff, a judgment creditor of the defendant James H. Gregory, after the

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return of an execution issued upon such judgment unsatisfied, to set aside certain conveyances of real estate ; to have the lands sold, and the proceeds applied to the payment of the plaintiff's judgment, &c. The referee to whom the action was referred found the following facts and conclusions of law, to wit :

That on the 28th day of June, 1864, the defendant James H. Gregory, was the owner in fee of two parcels of land, situate in the city of Rochester ; one of which, consisting of two and one half acres, with a dwelling house, barn, &c. worth eleven thousand dollars ; and the other, consisting of eighteen acres of land, of the value of \$3500, and on the days first mentioned, he, together with his wife, conveyed the first parcel of land to G. H. Humphrey, Esq. in trust, to convey the same to said Gregory and wife, as joint tenants, which conveyance was on the same day made by said Humphrey to the defendants as joint tenants in pursuance of the trust aforesaid. That there was no other consideration for said conveyances or either of them, except the purpose upon the part of said Gregory to make a provision for his wife according to the terms of the deed last aforesaid. That subsequently and on the first of October, 1864, the said Gregory indorsed a note for the benefit of Winslow the maker, which was on the same day discounted by the plaintiff, and is the note described in the complaint, and upon which the judgment therein mentioned was recovered. That in the month of November next following the month in which the said Gregory made the indorsement aforesaid, he, with his wife, made a mortgage to secure \$3000 to the savings bank, the object being to raise money to pay the debts of the former. That in consideration that his wife would execute the mortgage aforesaid upon the parcel of land conveyed in joint tenancy, as mentioned above, and of \$500 paid by Mrs. Gregory from her separate property, Gregory, on the 21st of November, 1864, conveyed to his wife, through the same trustee, the second parcel of land above mentioned. The referee found as a conclusion of fact, from all the evidence, that the above

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conveyances were made in good faith, and without any intent to defraud creditors.

It was further proved that on the 23d day of March, 1865, the defendants, by their deed of that date, duly acknowledged and recorded, conveyed the first parcel of land of two and a half acres above mentioned to G. N. Deming, for the consideration of \$11,000, and the proceeds of the land, after deducting the incumbrance of \$3000, were received by Mrs. Gregory. The recovery of the judgment upon the note aforesaid, and the issuing and return of the execution thereon at the times and manner stated in the complaint, were admitted by the defendants.

And the referee found as conclusions of law from the above facts :

First. That by the conveyance to Deming by Gregory and his wife, the estate vested in them by the deed from G. H. Humphrey, Esq. was severed, and that Gregory, in his own right as owner, was entitled to an undivided half of the proceeds of that sale.

Second. That Mrs. Gregory must account to the plaintiff for her husband's share of those proceeds, or the value thereof, so far as the same may be necessary to satisfy the judgment of the plaintiff, with interest and the costs of this action.

To each of which said findings of law the defendants excepted.

H. Humphrey, for the appellants. I. The property, consisting of the real estate afterwards conveyed to Deming, having been conveyed to the defendants, husband and wife, with intent to make provision for her future support during her natural life, while the husband was free from debt, and expected to continue so, was not, before it was sold to Deming, liable to his creditors. (*Jackson v. McConnell*, 19 *Wend.* 175. *Barber v. Harris*, 15 *id.* 615. *Jackson v. Stevens*, 16 *John.* 115. *Doe v. Parratt*, 5 *T. R.* 652 *Rogers v. Benson*, 5 *John. Ch.* 436. *Doe v. Howland*, 8 *Cowen*, 277.

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Brooke's Ab'r cui in vita, 8 *Cruise*, 363. *Green v. King*, 2 *W. Black*. 121. *Dean v. Hardenburgh*, 5 *Halst. N. J. Rep.* 42. *Hearsey v. Hearsey*, 5 *Mass.* 521-3. 1 *Dana*, 37. *Doe ex Ross v. Garrison*. *Taut v. Campbell*, 7 *Yerger*, 319. *Greenlaw v. Greenlaw*, 13 *Maine R.* 182-5. *Dickinson, v. Codwise*, 1 *Sandf. Ch.* 214. *Thornton v. Thornton*, 3 *Rand.* 179. *Rogers v. Gordon*, 1 *Dana*, 243. *Preston on Abstracts*, 2, 40.)

II. It was admitted by the pleadings, and not disproved or sought to be disproved, on the trial, that when the sale to Deming was made, the avails were received by Mrs. Gregory with the assent of her husband, as her own private and separate property, to her own use forever, which the referee has found was with out fraud, or at least, in which he has not found fraud.

Since fraud cannot be inferred, but must be proved, it follows that Mrs. Gregory was entitled to hold the property received from Deming, and the avails of it, to her own use, and that the referee erred in directing her to account for it, or any part of it. (2 *R. S.* 320, § 4, *tit.* 3, *ch.* 7, *part* 2. *Babcock v. Eckler*, 24 *N. Y. Rep.* 623.)

III. The referee erred in holding that the married woman's acts of 1860 and 1862, did not apply to the property received by Mrs. Gregory from Deming. (*Sess. Laws of 1860*, p. 157. *Id.* 1862, p. 343. *Goelet v. Gori*, 31 *Barb.* 314.)

IV. The plain intent of the married woman's act was that whatever estate she might have in lands, whether in severalty, tenancy in common, or joint tenancy, she should hold to her separate use, and that the same should not be subject to his control, or liable to his debts.

V. The act of 1860 is so unlike the acts in force when *Goelet v. Gori* was decided, that the reasoning of the judge in that case is inapplicable to this case, the statute of 1860 declaring that real or personal property which comes to a married woman by descent, devise, bequest, gift or grant, shall remain her sole and separate property, not subject to the control or interference of her husband, while the previous

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statute declared that she should hold in the same manner and with the like effect as if she were unmarried, the words "in the same manner and with the like effect as if unmarried" being omitted in the statute of 1860. The reason of the judge was, that married women were to take not jointly with, but as if they had no husbands. This was law, or rather statute, when Judge Sutherland decided, but not when the referee followed him.

L. Farrar, for the respondent. The conclusion of law to which the referee arrived, is at least as favorable to Mrs. Gregory as can be justly claimed for her. If the referee has committed any error, it is in determining the questions of law, in respect to her interests, too favorably.

I. Whether the estate vested in the defendants, Gregory and wife, by the deed of George H. Humphrey, was one joint tenancy; or whether, according to the view of the referee, the grantees, "both became seised of the entirety," &c. her interest does not seem to have been affected by the acts to protect the property of married women.

The intention of the legislature, clearly expressed in these several acts, was to enable a married woman to take and hold real estate, "to her sole and separate use," and not jointly with her husband. (*See Laws of 1848, p. 307; 1849, p. 528; 1860, p. 157; Goelet v. Gori, 31 Barb. 314.*) The estate in question was one in joint tenancy, if husband and wife are capable of holding real estate in that relation, under any circumstances, or under any kind of grant; for the deed, by express words, makes the grantees joint tenants. True, it is well settled, or was before the passage of the acts referred to, that husband and wife, under a grant or devise to them jointly, do not take, as tenants in common, or as joint tenants, but being deemed one person in law, they "both become seised of the entirety," &c. as is said by the referee. But in all the cases, wherein this doctrine has been held, it will be found that the grant or devise was to the husband and wife

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simply, without any words creating, or indicating, an intention to create a joint tenancy.

It is believed that the question under the precise facts in this case, has never been adjudicated. At common law, if a husband and wife were seised of land as joint tenants, before marriage, they would continue such afterwards, as to that land; and all the consequences of joint tenancy, such as severance, partition, and the *jus accrescendi*, would apply. (4 *Kent's Com.* 363.) It seems also that husband and wife may, by express words, in a deed of land to them, be made tenants in common. (2 *Preston on Abstracts*, 41. 1 *id. on Estates*, 132, 1 *Washburn on Real Property*, 444, § 4. 4 *Kent's Com.* 363.)

It would seem to follow that by express words they may be made joint tenants as well. If Gregory and wife took and held, as joint tenants, in accordance with the grant, and had continued to hold till the recovery of the judgment, the remedy of the plaintiff against the husband's interest in the property would have been certain and easy. His interest might have been sold on execution, and the purchaser would have acquired title to an undivided moiety of the property, making him tenant in common with Mrs. Gregory. (2 *Preston on Ab.* 43. 4 *Kent's Com.* 360, 363 and 364.) If, on the other hand, Gregory and wife, in virtue of the grant from Mr. Humphrey, became tenants by entireties, as husband and wife, the interest of the husband would have been equally, if not more valuable than in case of a joint tenancy, and the plaintiff's remedy would have been equally certain and easy. His interest would have been an estate for his own life in the whole property, in case his wife survived him, and an estate in fee in the whole, in case he survived her. This interest was worth, at least, half the value of the property, and more, and might have been sold on execution.

But, by the sale to Deming, the joint tenancy or ownership terminated, and whatever may be said of *the tenure by which the real estate was held*, there can be no doubt that under

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the common law rule the whole proceeds belonged to the husband. It cannot be claimed that the husband and wife were joint tenants in the proceeds, or that they were tenants by entireties. (*See 3 R. S. 14, § 44, 5th ed.; Check v. Wheatley, 3 Snead, 484, cited in 4 Kent's Com. 364; Comstock's ed.; see note.*) There is no such thing as a tenancy by entireties in personal property.

The referee holds, in substance, that the matter of the sale to Deming, and the conversion of the real estate into money, is controlled by the statutes relating to married women, and that Mrs. Gregory is entitled to an undivided half of the money, as tenant in common with her husband. The plaintiff does not object to this view, if it can be properly taken, and certainly Mrs. Gregory ought not to, for it is the most favorable view possible in respect to her interest.

The whole proceeds were \$11,000,; \$3000, of that, however, was a mortgage on the property, which Deming assumed. But Mrs. Gregory had received from her husband in the month of November previous, \$3000 as the consideration demanded by her, for executing that very mortgage. This was paid by the conveyance to her of eighteen acres of land, worth \$3500. Of the \$8000 received from Deming, she (being tenant in common with her husband, in the whole proceeds, \$11,000) having already received \$3000, was only entitled to \$2500, and her husband to \$5500. The whole having been received by her, she must account to creditors, &c. (*See Boyd et al. v. Hoyt, 5 Paige, 65; Stafford v. Mott, 3 Paige, 100; 2 Barb. Ch. Pr. 155, 156.*)

II. If the statutes for the benefit of married women had any effect upon the estate acquired by Gregory and wife, through the deed from Mr. Humphrey, it could only have been, to the extent of making her interest the same as if she had been as *feme sole*. In that view, she of course took as joint tenant with her husband, according to the express provisions of the deed; and then we come inevitably to the

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same final result reached by the referee, in respect to the proceeds of the sale.

By the Court, JOHNSON, J. To my mind it is a very clear proposition that our recent statutes for the better protection of the separate property of married women, have no relation to, or effect upon, real estate conveyed to husband and wife jointly. This was so held by SUTHERLAND, J. at special term in *Goelet v. Gori*, (31 Barb. 314.) In such a case the wife has no separate estate, but is seised with the husband of the entirety; neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate.

They hold thus not as joint tenants, or as tenants in common, but as tenants by entireties; and the same mode of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety. (2 *Kent's Com.* 132, 3d ed. *Torrey v. Torrey*, 14 *N. Y. Rep.* 430. *Jackson v. Stevens*, 16 *John.* 110. *Rogers v. Benson*, 5 *John. Ch.* 431.) Neither can sell without the consent of the other, and the survivor takes the whole. But during the life of both, the husband is entitled to possession of the entire estate, and to the rents and profits, and may even alien the wife's interest during their joint lives. And the estate will, it seems, be in such alienee, subject to the right of the wife or her heirs, to enter and enjoy the same, at the death of the husband, freed and discharged, from all his debts and engagements. (2 *Kent's Com.* 133. 1 *Preston on Abstracts of Title*, 334, 435, 436. *Jackson v. McConnell*, 19 *Wend.* 175.)

The debt in question was contracted by the husband while the defendants held the real estate, jointly, as husband and wife. Afterwards, and before the plaintiff obtained its judgment, the defendants conveyed the same to George N. Deming for \$11,000, who paid \$8000 in cash and assumed a mortgage of \$3000, which the defendants had previously given, upon

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the property. This sum of \$8000 was received by the wife and retained by her. So that when the plaintiff obtained judgment and issued execution, the husband had nothing out of which the debt could be collected. There was no intention, as the referee finds, to defraud creditors, in any of the transactions between the defendants. The question then arises, as to the legal effect and operation, in respect to the avails, upon the conveyance by them of the real estate thus held. When the estate thus held was voluntarily converted into money, to whom did the money belong? Undoubtedly, as it seems to me, it belonged to the husband exclusively, in virtue of his marital rights. The learned referee held, as a conclusion of law, that upon the sale the interests of the defendants became severed and each took, as matter of law, one half of the avails.

But I am unable to see upon what principle of law such a result could be produced. Their estate in the land was an entirety, arising from their unity as husband and wife; and how the joint conveyance of this estate by them, and its conversion into money, could operate as a severance of the money, into equal parts, and vest such parts in each, as separate property, would be difficult, I think, to demonstrate. It would rather, in my opinion, follow the law of personal property in possession of the husband, and vest in him exclusively. The defendants' counsel insists that inasmuch as there was no fraud in the transfer of the real estate, by which it was vested in the defendants as husband and wife, the wife is entitled to retain the proceeds of the sale to her own use as against the creditors of the husband, who became such during the joint ownership of the realty. This I think would have been the case, had the real estate been settled upon, and conveyed to her, as her separate estate. The husband, at the time of the conveyance to the trustee, and the reconveyance by the latter to both was free from debt and might have vested her with the exclusive title, and had that been done, equity, would, upon familiar principles have pro-

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tected the right of the wife, against the claims of subsequent creditors of the husband, both as respects the land and its avails, upon a sale by her. This has often been done, and it is unnecessary to cite authorities to sustain the proposition. But that is not the case here. No separate estate was settled upon, or vested in, the wife; nor was it even so intended. It was intended that the husband should have a joint title, with right of exclusive control during the joint lives, and the entire estate if he survived. He did not give up, or design to give up, his entire interest and settle it upon his wife. It is argued, however, that equity should protect the wife the same as though she had been vested with the entire title; because it was intended as a provision for her future support during her natural life. The referee has not found that such was the fact, although there was evidence before him tending to prove it. But this is not very material, because he could not have found that it was intended to vest in her the exclusive title, or to provide for her future support and maintenance in any other manner or to any greater extent than would legally flow from such an arrangement as was in fact made. It was not even found, nor was the fact proved, that when the wife received the avails of the sale, they were so received by her upon any understanding or agreement between herself and her husband that they should be hers exclusively, and be held and used by her as her separate property. She received them and held them with such right only as the law accorded to her. It is not necessary in this case to discuss, or to determine, the question, whether under all the circumstances of the case equity would, notwithstanding the strict rule of law, protect from the creditors, of the husband a moiety of the avails of the sale, in view of the manifest intention to settle upon her an interest in his property, for her future use and benefit; because the plaintiff's demand will only consume a small portion of the other moiety. And I feel very clear that no rule of equity will give the wife the entire amount as her separate property, to the ex-

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clusion of the rights of the husband and of his creditors. To do that, would require a new arrangement entirely, and one never contemplated by the parties themselves, which no court has any power to make. Under the arrangement they did make, and consummate, when the land was conveyed to both, the creditors of the husband had rights as against his alienable interest, and the court should not, even if it had the arbitrary power, now, deprive them of those rights.

The real estate belonged originally to the husband exclusively, and he caused it to be conveyed to them jointly. This gave him the use and control of it, and the right to take and use as he might see fit, the rents and profits, during their joint lives at least ; and if it were to be held that such a disposition of one's property deprived creditors of all claim upon it, a new and convenient mode would be discovered of keeping and enjoying any amount of property in defiance of any and all creditors. But as there never was any separate estate or right in the wife, neither the statutes, nor the rules of equity, are sufficient to enable her to appropriate the entire property to herself, to the exclusion of the husband's creditors, although they became such during the joint ownership.

I am clearly of the opinion, therefore, that the referee has committed no error of which the defendants or either of them can complain, and that the judgment should be affirmed.

[MONROE GENERAL TERM, June 8, 1867. *Wolles, E. D. Smith and Johnson, Justices.*]

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49b	166
69 AD	989

The provision of section 5 of subdivision 2, of the act of April 3, 1849, to amend the Revised Statutes, in relation to summary proceedings to recover the possession of land, which authorizes such proceedings, when instituted before a justice of the peace, to be removed by appeal to the county court, in the same manner and with the like effect, as appeals from the judgments of justices of the peace in civil actions, but directs that in case of appeal by the tenant, in order to stay the issuing of a warrant or execution, security shall also be given for the payment of all rent accruing or to accrue upon the premises subsequent to the application to the justice, does not apply—so far as relates to a stay—to proceedings instituted against a tenant solely on the ground that he is holding over after the expiration of his term.

That section of the statute does not create a right to stay the issuing of the warrant in a case where it did not previously exist, but it merely provides that in order to exercise the right to stay, in cases where it previously existed, security shall be given as therein prescribed.

An appeal to the county court, taken by virtue of the act of 1849, of itself, merely transfers the proceedings to the county court for the purpose of review, but does not affect the power of the justice to issue a warrant to enforce his judgment.

And a warrant so issued, being regular and valid, and the landlord having been put into possession of the premises by virtue of it, he is justified in using so much force as is necessary to defend himself and maintain his possession.

And in an action against him, by the tenant, for an alleged assault and battery committed in repelling the attempt of the tenant to re-enter, the only question for the jury is whether the defendant used an excess of force.

Even though it be assumed that a justice of the peace has not power to issue a warrant to dispossess a tenant after an appeal by the latter to the county court, yet his judgment, until reversed or set aside, is of force as an adjudication, and it determines that the lease has expired and the landlord is entitled to the possession of the premises. The fact that an appeal has been taken does not affect the conclusive nature of the judgment as a bar, while it remains unreversed. It is therefore erroneous to charge that the judgment ceased to be *res judicata* when the appeal was perfected.

Where the landlord and owner in fee, claiming that the term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands and attempt to dislodge the former by force. The landlord being in the actual possession has a right to maintain it, and to use force, if necessary, for that purpose.

ACTION for assault and battery. Defense. 1. A general denial. 2. That at the time of the alleged assault, the defendant was the owner and in possession of certain real

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estate, consisting of a store and building in the town of Starkey, Yates county, and the alleged assault was committed in defense of his possession and to prevent great bodily harm being done him by the plaintiff, who, with the assistance of divers persons armed with axes, &c. wrongfully entered to expel the defendant. 3. *Son assault demesne.*

On the trial at the Yates circuit in March, 1866, the following facts were proved. The defendant, Harpending, was the owner of a block of buildings in the village of Dundee, known as Harpending's block. On the 7th of April, 1865, and for about two years next preceding that date, Sage, the plaintiff, was in possession of certain rooms in said block, as tenant of the defendant, under a lease. On the 7th of April, 1865, Harpending instituted summary proceedings before a justice of the peace, under the statute, to remove Sage, on the ground that he was holding over after the expiration of his term, without the permission of his landlord, alleging that the term of the lease expired on the 1st of April, 1865. Sage appeared in the proceedings, and made an affidavit, admitting his tenancy, and his occupation of the premises, but denying that his term had expired, and alleging that by the terms of the agreement between him and Harpending his term would not expire till the 1st of April, 1866. The issue thus joined was tried before the justice on the 13th of April, 1865, who on the same day gave judgment in favor of Harpending, for the immediate possession of the premises, and his costs. On the same day, and before a warrant was issued, Sage perfected an appeal from said judgment to the Yates county court, and on such appeal put in an undertaking executed by a sufficient surety, conditioned as required by law to make such appeal effectual, and conditioned that the tenant would pay all rent accruing or to accrue upon the premises described in the landlord's affidavit in said proceedings subsequent to the application made by said landlord to the justice to remove said tenant. After the appeal was perfected and the undertaking was put in, and on the 15th of

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April, 1865, the justice, at the request of Harpending, issued his warrant of possession, against Sage. After the appeal, and before the issuing of the warrant, it had become a question of discussion between the counsel of the respective parties, in the presence of Harpending, whether the justice had any right to issue his warrant after the appeal was perfected and the undertaking was put in. On Saturday, the 15th of April, about five o'clock in the afternoon, while Sage was absent, the sheriff, with the warrant and without force or violence, put Harpending into possession of the premises, with the understanding that Sage's personal property might remain there, undisturbed, until Monday morning at nine o'clock. As soon as Harpending got possession he fastened the building securely, so that no one could enter it without breaking in, and on Sunday he commenced taking down partitions erected by Sage. On that day Sage went to the building and called upon Harpending to open the door, but he refused. Sage then broke into the building, through a window sash. Other persons acted in concert with him, one of whom used an axe to effect an entrance. The testimony tended to show that while Sage was on the outside Harpending showed him a pistol and told him he must not come in, and that as soon as Sage broke through the window, he went towards Harpending as fast as he could. When he was about five feet from Harpending, the latter fired upon him, with the pistol and shot him in his left breast. Sage was protected by his clothing and the contents of his vest pocket, so that the skin was not broken, but he received a bruise upon the breast. As soon as the pistol was fired, Sage sprang upon Harpending and took hold of him; Harpending struck Sage on the head with the pistol, and drew blood, but soon after, the pistol was taken from him, and, as the testimony tended to show, he was overpowered and compelled to surrender possession of the premises to Sage. The action was brought for the personal injury sustained by Sage, and he recovered a verdict for \$300.

On the trial, the judge ruled that unless the defendant

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could show that the warrant was legally issued, upon a proper judgment, and proceedings had for the purpose of dispossessing the plaintiff, the defendant was not justified in holding possession of the premises. He also ruled that the appeal removed the proceedings from the justice to the county court, and the justice had no right to issue the warrant after the notice of appeal was served on him, and that the warrant was void.

He also charged the jury that the appeal and bond given, and the proceedings had by the plaintiff, operated as a stay of proceedings, so that the justice had no right to issue the warrant; that the warrant was void; and that the defendant was not rightfully in possession.

He also charged that the defendant was a trespasser in taking possession of the building, and the plaintiff had a legal right to break into the building, and the defendant was guilty of a wrong in resisting the plaintiff in getting in.

The counsel for the defendant excepted to these several rulings, and requested the judge to charge the jury that if the defendant had possession in fact, he was justified in using violence if necessary to defend his possession. The court declined so to charge, but charged that the defendant was a mere trespasser, who had but recently entered, and the plaintiff had the right, if compelled to do so, to use force to eject the defendant.

The defendant's counsel also requested the court to charge that the judgment before the justice between the parties, was *res judicata*, and settled the rights of the parties, and that the plaintiff was holding over his term; but the court declined, and charged that the judgment ceased to be *res judicata*, after the appeal was perfected, with the security.

The defendant's counsel also requested the court to charge that the plaintiff could not recover in this action, except on the ground that excessive violence was used by the defendant, in defending his possession; but the court declined, and charged that it was not so in this case.

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The defendant's counsel also requested the court to charge that from the undisputed facts of the case, the plaintiff was not entitled to recover against the defendant, for the reason that all the force he used, was insufficient to maintain his possession, but he was overpowered and compelled to surrender the same; but the court declined so to charge, or to charge on that point otherwise than he had already done.

The counsel for the defendant excepted to the several refusals to charge, and the several instructions above stated, and the court ordered a stay of proceedings on the verdict, and that the exceptions be heard at the general term in the first instance.

Charles S. Baker, for the defendant.

D. J. Sunderlin, for the plaintiff.

By the Court, JAMES C. SMITH, J. It was held at the circuit, that the warrant issued by the justice was void, and consequently, that it furnished no justification to the defendant. In order to affirm this ruling it is necessary to maintain either that the security given on bringing the appeal stayed the issuing of a warrant, or that by the operation of the appeal itself the proceeding was transferred to the county court, so that the justice could no longer act in it. These propositions will be considered in the order in which they are stated.

The question whether the issuing of a warrant was stayed by the security given, depends upon the construction of certain statutory provisions respecting summary proceedings to recover the possession of land, to which it becomes necessary to refer.

In 1849, an act was passed amending the revised statutes relating to summary proceedings, so as to confer jurisdiction of such proceedings upon justices of the peace. (*Laws of 1849*, p. 291, ch. 193.) One of the sections of said act pro-

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vides that the proceedings before a justice of the peace, may be removed by appeal to the county court, in the same manner, and with the like effect, and upon like security, as appeals from the judgments of justices of the peace in civil actions, but that in case of appeal by the tenant, in order to stay the issuing of a warrant or execution, security should also be given for the payment of all rent accruing or to accrue upon the premises, subsequent to the application to the justice. (§ 5, *subd.* 2.) It is by virtue of the latter clause of the section, that the undertaking given in this case is claimed to have operated as a stay. The defendant's counsel insists, however, that the provision as to a stay, does not apply to proceedings instituted against a tenant solely on the ground that he is holding over after the expiration of his term; and I am inclined to think, in view of the provisions of the Revised Statutes *in pari materia*, that the construction contended for by him is correct.

The Revised Statutes provide that summary proceedings to remove tenants may be resorted to in four distinct classes of cases: 1. Where the tenant holds over after the expiration of his term. 2. When he holds over after default in the payment of rent. 3. When the tenant has taken the benefit of an insolvent act, or of an act relieving him from imprisonment; and 4. Where such person continues in possession of real estate which has been sold under execution against him, after title under such sale has been perfected. (2 R. S. 512, § 28.) Section 43 provides that whenever a warrant shall be issued for the removal of the tenant, the relation of landlord and tenant between the parties shall be deemed to be canceled and annulled. The next three sections provide for a stay of the issuing of the warrant in each of the last three clauses, on security being given by the tenant as required by the statute. In the case of a proceeding for the non-payment of rent, the tenant is to pay the rent due and the costs, or to give security for the payment of them in ten days; and by an amendment adopted in 1857, if he does not

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within the ten days, produce to the magistrate satisfactory evidence that the rent and costs have been paid, the warrant may issue at any time thereafter. (*Laws of 1857, ch. 684, p. 510, § 4.*) When the application is founded upon the fact that the tenant has taken the benefit of an insolvent act &c. the tenant must pay the costs and give security for the payment of the rent as it shall become due. And when it is founded upon an alleged sale by execution, the occupant must pay the costs, file an affidavit that he claims possession by virtue of some title or right acquired after the premises were sold, or as guardian or trustee for another, and execute a bond to pay the costs which may be recovered against him in any ejectment that may be brought by the applicant within six months; to pay the value of the use and occupation of the premises from the date of such bond, till the applicant shall recover possession in such ejectment; and not to commit waste. But no provision is made for staying the issuing of a warrant in the case of an application on the ground that the tenant is holding over after the expiration of his term. Section 47 provides for a *certiorari* from the Supreme Court, to review any adjudication made in such proceedings, but it directs that the proceeding shall not be stayed by such *certiorari* or any other writ or order of any court or officer. Section 48 provides that whenever any such proceedings brought before the Supreme Court by *certiorari* shall be reversed or quashed, the court may award restitution to the party injured, with costs. And the 49th section provides that in all cases the prevailing party shall recover costs, and may maintain an action to recover them; and if the proceedings be reversed or quashed, by the Supreme Court, the tenant may recover any damages he may have sustained by reason of such proceedings, with costs, in an action on the case. While, on the one hand, the stringency of these provisions evinces the design of the legislature to make the proceedings summary to which they relate, on the other hand, they attempt to protect the substantial rights

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of tenants, and they are severally applicable, as well to proceedings before justices of the peace under the act of 1849, as to those instituted before any of the other magistrates to whom jurisdiction was given by the Revised Statutes. The jurisdiction of justices of the peace, is conferred, not by an independant statute, but by an amendment of section 28 of the Revised Statutes, the effect of which is to include justices of the peace among the magistrates who are vested with jurisdiction by that section. But the provisions of the act of 1849, respecting a stay of the issuing of a warrant, apply exclusively to proceedings before justices of the peace. If they have the effect which the counsel for the plaintiff attributes to them, it follows that a tenant holding over after the expiration of his term, if proceeded against before a justice of the peace, may stay the issuing of a warrant after judgment against him, but not if he is proceeded against before any of the other classes of magistrates having a co-ordinate jurisdiction. And if this be so, the right is of little value to tenants proceeded against on that ground, since it is in the power of landlords to deprive them of it, by instituting proceedings before some magistrate other than a justice of the peace. The better construction seems to be that the section of the act of 1849, above referred to, does not create a right to stay the issuing of the warrant in a case where it did not previously exist, but it merely provides that in order to exercise the right to stay, in cases where it previously existed, security shall be given as therein prescribed. The language is, not as in the sections of the Revised Statutes *in pari materia* ; (2 R. S. p. 515, §§ 44, 45, 46 ;) the issuing of the warrant "shall be stayed" if the tenant shall give the security prescribed, but it is "*in order to stay the issuing of such warrant*" security shall be given, &c. This implies a right to stay, already existing, and it prescribes the form of security to be given in order to exercise such right. It is by no means clear that the section supercedes the provisions of the Revised Statutes, even as to the form of security, or

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that it does any thing more than to require an additional security in the case of an appeal ; but it is not necessary to decide that point.

The construction above adopted gives full effect to the language of the section ; leaving it to operate on the three classes of cases in which a right to stay the issuing of a warrant is given to the tenant, by the Revised Statutes.

The proposition that the appeal, of itself, deprived the justice of authority to issue a warrant, requires but a moment's consideration. If the legislature intended that an appeal should have that effect, it was useless and unmeaning to enact that in order to stay the issuing of a warrant, security should be given, in addition to that required on appeal. The appellate court could not issue a warrant upon the judgment of the justice, and if the justice could not do it, by reason of the appeal, the giving of further security to prevent it would be an idle ceremony. I apprehend that an appeal taken by virtue of this statute, of itself, merely transfers the proceedings to the county court for the purpose of review, and does not affect the power of the justice to issue a warrant to enforce his judgment.

If these views are correct, the warrant was regular and valid, and the defendant having been put into possession of the premises by virtue of it, was justified in using so much force as was necessary to defend himself and maintain his possession.

But as the construction of the statute is not altogether free from doubt, and there are other views of the case leading to the conclusion above stated, I will briefly consider them.

If it be assumed that the justice had not power to issue a warrant after the appeal, nevertheless his judgment, until reversed or set aside, was of force as an adjudication, and it determined that the lease had expired, and Harpending was entitled to the possession of the premises. The fact that an appeal had been taken, to another court, did not affect the conclusive nature of the judgment as a bar, while it remained

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unreversed. (*Harris v. Hammond*, 18 *How. Pr.* 123.) The counsel for the defendant requested the court to charge to that effect, but the learned judge declined, and charged that the judgment ceased to be *res judicata* when the appeal was perfected with security. The point was material to the defendant, for even if he was stayed from suing out a warrant on the judgment, yet in this collateral action he was entitled to use the judgment as evidence of his right to the possession, and it was important to him to maintain that he had such right. I conceive the ruling on this point was erroneous.

But let it be further assumed, not only that the warrant was void, but also that the judgment had ceased to be a bar, and that it was an open question whether the tenancy had terminated or was still in force; how then stands the case? The landlord, and the owner in fee, claiming that the term had expired, enters without process and without force, during the temporary absence of the tenant, but the tenant attempting soon after to oust him by violence, the landlord resorts to force to maintain his possession. Which committed the first assault? There is not a particle of evidence that the plaintiff was entitled to the premises. His lease is not shown, and nothing appears on that point, except that he claimed that the term continued till April, 1866, and the defendant disputed the claim. The defendant, when he entered, was not guilty of an assault, or a breach of the peace. Even if it be assumed that he was a trespasser, his position was very different from that of a mere stranger. He owned the premises in fee, and claimed to be entitled to the possession. Under these circumstances, the plaintiff had no right to take the law into his own hands, and attempt to dislodge the defendant by force, although his intrusion was but recent. The defendant, being in the actual possession, had a right to maintain it, and to use force, if necessary, for that purpose. This precise point was adjudged by this court in the case of *Parsons v. Brown*, (15 *Barb.* 590.)

The defendant being justified in using so much force as was

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necessary to defend himself and maintain his possession, the only question for the jury, in any view of the case, was whether he used an excess of force.

The result is, that a new trial should be ordered.

Ordered accordingly.

[MONROE GENERAL TERM, June 3, 1867. *J. C. Smith, E. D. Smith and Johnson, Justices.*]

McMANNIS vs. BUTLER.

In an action for trespass on real estate, the plaintiff claimed to have acquired the title in fee to the premises by a purchase at a foreclosure sale. The defense was that the plaintiff's title was subject to a public easement or right of way; that the *locus in quo* was a public street; and that the acts complained of were done by the defendant in the rightful exercise of his authority as street superintendent, and by the direction of the common council of the city of Rochester, who had control of the streets of the city. The only evidence to prove the existence of the alleged street consisted of testimony tending to show a dedication and user; but there was no proof of an effective dedication prior to the execution of the mortgage in 1857, at a sale under which the plaintiff became the purchaser; the only evidence looking that way being a map, made and filed in 1826, on which the premises were marked as a part of a street. But there was no proof of an acceptance by the city, nor that the parties who made and filed the map ever owned the premises, or had any right or authority to dedicate them. *Held* that the evidence was insufficient to show a dedication of the premises to the public.

It was also proved that in 1858, the city authorities caused a street, including the premises in question to be improved and worked; that in so doing, the defendant, as street superintendent, tore down a house upon the premises, with the consent of the owner, and the city paid him the value of it; and that ever since, the street, including the premises in question, had remained open, and had been used as a public highway, under the control of the city authorities, with the exception of certain acts of occupation by the plaintiff. The defendant claimed that the city had an interest in the premises, by virtue of the purchase from the former owner (the mortgagor) and was not served with notice of the foreclosure proceedings; that the plaintiff therefore was not entitled to assert possession of the premises, to the exclu-

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sion of the city, at the time of the alleged trespass. *Held* that if the city was not served with notice, the only consequence was that, as to it, the mortgage was unforeclosed, and the plaintiff was to be regarded as a mortgagee in possession. That his mortgage being past due, and paramount to the rights of the city, was sufficient to maintain his possession, as against the defendant.

It is a general rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing.

Section 156 of chapter 143 of the laws of 1861, (being an act in relation to the city of Rochester) which directs that "Whenever any street, alley or lane shall have been open to and used as such by the public, for the period of five years, the same shall thereby become a street, alley or lane for all purposes, and the said common council shall have the same authority and jurisdiction over, and right and interest in, the same, as they have by law over the streets, alleys and lanes laid out by it," was not intended to have a retro-active effect, so as to divest parties of existing rights, or to justify trespasses committed before it was passed.

THIS was an action for trespass on real estate described as a lot in the city of Rochester, on the south side of Champion street, thirty feet front and eight rods deep. The cause was tried at the Monroe circuit, in January, 1867, and a verdict was rendered in favor of the defendant, under the direction of the court. The plaintiff proved a deed of a tract of land including the premises in question, from William J. McCracken to Milton Ingersoll, dated and recorded in 1850; a mortgage of the lot in question, for \$936.40, from Ingersoll to The Eagle Bank of Rochester, dated and recorded in August, 1857; and an assignment of said mortgage from The Traders' Bank of Rochester, the legal successor of The Eagle Bank, to the plaintiff, dated February 21, 1865; and proceedings to foreclose said mortgage by advertisement, recorded May 24, 1865, from which it appeared that said premises were bid in on the foreclosure sale, by the plaintiff, on the 20th of May, 1865. The plaintiff also proved that Ingersoll moved a house on to the mortgaged premises, and inclosed a part of the same, and continued in possession, until 1858, when the house was torn down; and that the plaintiff went into possession of the premises in June, 1865,

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and built fences on the lines thereof; and that afterwards, in the same month, the defendant went upon the premises, tore down the fences on the north and south lines, and filled up the post holes. The plaintiff then rested.

The defendant then put in evidence a map of the McCracken tract, made and filed in Monroe county clerk's office, in 1826, by Daniel Perkins, on which map the premises in question were marked as a part of a street called Burnes street. The defendant also proved that said premises, before Ingersoll purchased them, were not enclosed, and were used by teams passing to and from Champion street; that soon after Ingersoll received his deed, in 1853, he removed the house above mentioned on to the premises; that it was a small house, twelve by sixteen feet; no cellar was dug under it, but it was placed on blocks, and so remained, until June, 1858, when it was taken down; and that Ingersoll said that he put the house on blocks so that it could be moved away easier, if necessary, and that he supposed the lot was a street, for it was laid out as such; that Ingersoll enclosed and cultivated a part of the lot; that in June, 1858, the proper authorities of the city caused Burnes street, including the premises in question, to be improved and worked; that in so doing, the defendant, who was street superintendent, tore down said house, with Ingersoll's consent, and paid him the value of it and of the vegetables growing on the lot, which he accepted; and that ever since, Burnes street, including the premises in question, has remained open, and has been used as a public highway, under the control of the proper city authorities, until the acts of occupation of the plaintiff above stated. The defendant also put in evidence section 156 of chapter 143 of the laws of 1861, being an act in relation to the city of Rochester, which is as follows:

"Whenever any street, alley or lane shall have been open to and used as such by the public for the period of five years, the same shall thereby become a street, alley or lane for all purposes, and the said common council shall have the same

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authority and jurisdiction over, and right and interest in, the same, as they have by law over the streets, alleys and lanes laid out by it."

The testimony being closed, the court directed the jury to find a verdict for the defendant, under the following decisions and instructions :

1. That there had been no effective dedication of the premises in question, or any part thereof, as a street, prior to 1858 ; but that the acts of Milton Ingersoll in accepting payment from the common council of the city, for the said dwelling house, amounted to a new dedication of the land, for a street, which was binding upon his prior mortgagees, and upon the plaintiff.

2. That the acts of the city authorities, at that time and since, in reference to said street, were an acceptance of said dedication, and that such dedication had also been accepted by the public, by the user ever since.

3. That said section 156, above transcribed, was applicable to the facts of this case, and was in the nature of a statute of limitations. And as said street had been open to, and used by, the public as a street for five years since June, 1858, though less than five years since, 1861, at the time of the alleged trespasses, it thereby became a public street of said city.

The plaintiff's counsel excepted to the first and third of the instructions above stated, separately, and the court ordered a stay of judgment, and that the exceptions be heard at the general term, in the first instance.

J. C. Cochrane, for the plaintiff.

E. A. Raymond, for the defendant.

By the Court, JAMES C. SMITH, J. It appears to have been taken for granted, on the trial, that the plaintiff acquired the title in fee, to the premises in question, by his purchase at the foreclosure sale. The defense sought to be established was, that the plaintiff's title was subject to a public ease-

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ment or right of way ; that the *locus in quo* was a public street ; and that the acts complained of were done by the defendant in the rightful exercise of his authority as street superintendent, and by the direction of the common council, who had control of the streets of the city.

The only evidence introduced to prove the existence of the alleged street consisted of testimony tending to show a dedication and user ; but as the judge expressly ruled, there was no proof of an effective dedication prior to the execution of the mortgage to the bank, in 1857. The only item of evidence looking that way was the map made and filed by Daniel McCracken and Charles Perkins, in 1826, on which the premises were marked as a part of a street, called Burnes street. But so far as the case shows, there was no proof of an acceptance by the city, nor indeed that the parties who made and filed the map ever owned the premises, or had any right or authority to dedicate them. At any rate, if there was any evidence tending to show either an acceptance by the city, or even by the public, there was no request to submit it to the jury, and it seems the court passed upon it without objection by either party.

But the judge also ruled that the acts of Ingersoll, in accepting payment for his building and growing crops, from the common council, in 1858, amounted to a dedication, and that such dedication was binding upon his prior mortgagee, the Eagle Bank, and also upon the plaintiff, who acquired title through the bank mortgage. I do not understand the counsel for the defendant to claim that the latter proposition can be maintained, in the precise form in which it is stated in the case, but he argues that the evidence shows that there was a dedication of the premises, in 1826, which did not become effective, merely because it was not accepted by the public or the common council ; that notwithstanding the want of such acceptance the public acquired certain rights in the premises, which were simply in abeyance ; that the possession of Ingersoll was in subordination to those rights, and

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in recognition of them ; that the bank took the mortgage with notice of the character of his possession and of the rights of the public ; and that Ingersoll, by accepting payment and surrendering possession, revived the former dedication, so that it bound his prior mortgagee. But his reasoning reats upon the assumption that there was a dedication of the premises in 1826, which, as we have seen, is entirely unsupported by the evidence.

It is claimed by the counsel for the defendant that the city had an interest in the premises, by virtue of the purchase from Ingersoll, and was not served with notice of the foreclosure proceedings ; that the plaintiff therefore was not entitled to assert possession of said premises, to the exclusion of the city, at the time of the alleged trespass. If the city was not served with notice, the only consequence is that as to it the mortgage is unforced, and the plaintiff is to be regarded as a mortgagee in possession. His mortgage being past due, and paramount to the rights of the city, is sufficient to maintain his possession, as against the defendant.

The only remaining question is whether the statute relied upon by the defendant as a statute of limitations, was intended to have a retro-active effect. I think it was not. Its language evidently contemplates future acts only. There is nothing in its terms warranting the idea that it was intended to divest parties of existing rights, or to justify trespasses committed before it was passed ; yet each of those mischiefs might result from it, if it were retrospective. Full effect is given to its words by holding that it is prospective only ; and it is a general rule that a statute affecting rights and liabilities should not be so constructed as to act upon those already existing. (7 *John*. 477. 18 *id*. 138. 2 *Hill*, 238. 3 *Barb*. 306.)

A new trial should be ordered, with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, June 8, 1867. *J. C. Smith, E. D. Smith and Johnson, Justices.*]

CATHARINE SINGER vs. PETER TROUTMAN.

To exempt a surety from liability by reason of the neglect and refusal of the creditor to collect the debt of the principal debtor while he was solvent, although requested to do so, by the surety, it must be shown that the creditor was requested to enforce the collection of the debt *by due process of law*. Nothing short of that, in such a case, will exonerate the surety.

Where the request was, that the creditor should "push" the principal debtor, "and keep pushing him;" *Held*, that the words used had not the same legal significance as the words "prosecute or collect;" that to give those terms the same legal significance, it was necessary not only that the creditor should have understood them in that sense, but that the surety should have meant and intended that also.

The terms in which such a request are made, are not material, but they should be unequivocal, and clearly and plainly intended and understood as a request to collect by prosecution.

A PPEAL from an order made at a special term, denying a motion for a new trial, before judgment. The action was upon a promissory note made by the defendant and one Jacob Troutman, dated October 24, 1862, by which the makers promised to pay the plaintiff \$100, three months after date, with interest. The defense set up, in the answer, was that the note was signed by the defendant without consideration, and as surety for Jacob Troutman, the principal maker; of which the plaintiff had notice at the time of making the note. That the plaintiff, at or about the time the note matured, made an agreement with Jacob Troutman, to extend the time of payment, thirty days, or more. That when the note became due, Jacob Troutman was perfectly solvent, and the same might have been collected out of his property. That after the said note became due, and while said Jacob Troutman was perfectly solvent as aforesaid, the defendant requested and demanded of said plaintiff that she should proceed immediately to collect said note; but said plaintiff unreasonably and wholly neglected and refused to do so. That between the time of the maturity of said note, and the commencement of this action; and since the aforesaid demands and requests of the defendant, that said plaintiff should collect said note,

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the said Jacob Troutman had become totally insolvent ; and that the failure to collect said note of said Jacob Troutman before his insolvency, was entirely owing to the negligence and unreasonable delay of the plaintiff as aforesaid, against the express request, demand and direction of the defendant.

The action was tried before Justice WELLES, and a jury. The jury found a verdict for the plaintiff, for the amount of the note, with interest.

Miller & Hawley, for the appellant.

Wm. Burroughs, for the respondent.

By the Court, JOHNSON, J. The action was against the defendant as surety upon a promissory note. The defense was, that the plaintiff neglected and refused to collect the debt of the principal debtor, while he was solvent, although requested so to do by the defendant ; and that such principal had become wholly insolvent, at the time of the commencement of the action. The evidence on the question at issue, was conflicting, the defendant's evidence tending quite strongly to show that the plaintiff was requested, after the note became due, to collect it of the principal maker by the use of legal means. The plaintiff, on the other hand, testified that the defendant once asked her about the note, and learning that the principal debtor had not paid it, told her that she "must push Jacob ; he was getting so careless, and keep pushing him ;" that he did not request her to prosecute him, or to collect the note ; and that she did not understand that the defendant wanted her to sue. That she "didn't take it that way." There was no dispute, that the principal maker was solvent at the time the plaintiff was spoken to, nor that he was insolvent when the action was commenced and tried. The judge submitted the question to the jury, upon the testimony, to determine whether the defendant had, or had not,

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requested the plaintiff to enforce the collection of the note by legal means ; and instructed them that if he had done so, the plaintiff could not recover ; but if, on the contrary, they should find that the defendant only requested the plaintiff to push the principal, and keep pushing or urging him, only, and did not request her to collect by legal proceedings, the plaintiff would be entitled to a verdict for the amount due upon the note. No exception was taken to the charge. The defendant's counsel then requested the court to charge, that if the plaintiff understood the words "to push Jacob, (the principal debtor,) and keep pushing him," as sworn to by her as a request, in fact, to prosecute him or to collect the note, it was of the same legal effect as if the defendant had used the words prosecute or collect. The court refused so to charge, and the defendant's counsel excepted. This refusal presents the only question for review in the case. The request, as made, did not embody a sound proposition in law, and the judge properly refused to charge in accordance with it. If the request, by the defendant, was merely "to push Jacob, and keep pushing him," it was not a request to collect by legal proceedings, unless that was what the plaintiff meant, and intended by it. It might, and more naturally would be taken as a request merely to urge and importune. And if the plaintiff used those words, and merely intended that Jacob should be urged or importuned continuously, then there was no request to collect by legal proceedings, even had the plaintiff so understood it ; and the words had not the same legal signification as the words "prosecute or collect." To give those terms the same legal significance, it was necessary not only that the plaintiff should have understood them in that sense, but that the defendant should have meant and intended that also. This latter portion was not embraced in the proposition. The true question was fairly and impartially submitted to the jury, to wit, whether the defendant had requested the plaintiff to enforce the collection of the note by due process

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of law. As I understand the rule, nothing short of that, in such a case, will exempt a surety from his liability. (*Remsen v. Beekman*, 25 *N. Y. Rep.* 552.) This should be held strictly as the rule, inasmuch as the surety has it always in his power, after the debt has become due, to pay it off himself, and take his legal remedy over against his principal. If he elects not to discharge his legal obligation in that way, he should at least be required to request the creditor, directly and clearly, to enforce collection of the principal by process of law. The terms in which the request is made, are not material, but they should be unequivocal, and clearly and plainly intended, and understood, as a request to collect by prosecution. He should never be absolved from his deliberate and valid promise, upon any doubtful or uncertain request not plainly intended and understood as a request to enforce collection by legal means.

The verdict cannot be set aside as against evidence. There was evidence on both sides, and it was for the jury to say where the truth lay. If there is an apparent preponderance on the side of the defendant, looking at the case, merely, it is not such as to enable us to say that the jury were in any respect misled, or were actuated by partiality or prejudice.

The order denying a new trial must, therefore, be affirmed, and judgment ordered for the plaintiff on the verdict.

[MONROE GENERAL TERM, June 8, 1867. *Wells, E. D. Smith and Johnson*, Justices.]

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27ap341**HANKS vs. DRAKE and others.**

A purchase of stocks by brokers, as agents for another, with an advance of money by the former on account of the latter, upon condition that the principal shall deposit a margin of ten per cent, and deposit a further margin when required by the agents, is not to be considered a pledge of stocks for the payment of a sum of money advanced thereon, and requiring a notice of the time and place of selling the pledge, to make the sale legal.

Under such an agreement, the agents have a right, upon the principal's failing to deposit a further margin when required so to do, to sell the stock and close the transaction.

This right to sell arises from the previous violation of the contract on the part of the person for whom the stock was purchased, and who, by neglecting to perform on his part, has terminated the obligation of his agents to hold the stock any longer, and left them at liberty to sell the stock for their own protection.

The notice which the law requires in the case of the sale of pledged stock, as security for the payment of a sum of money advanced thereon is not required, in such a case.

But before the owner of the stock can be called upon under such a contract, to deposit any additional margin, the agents should give him notice that his margin is diminished, and that they require a further margin. And a reasonable time to comply should be allowed, before the stock can be sold.

Where agents, within two hours after giving notice to their principal that a further margin was required, no time being specified for compliance, sold the stock and rendered an account of sales; *Held* that the court could not hold, without further evidence, that reasonable time for performance had been given. That to decide that point as matter of law, the facts should appear, by which the court could say the party was able, within the time given, to do the act required, and therefore that the time was reasonable.

Where all the evidence on that subject was that furnished by a former transaction between the same parties, in which, the same notice being given, the agents waited until the next morning, when the deposit was made, and it was satisfactory; *Held* that the principal had a right to suppose that the same course of dealing which had occurred on the former transaction, and was satisfactory to the agents, was expected in the present case; and if the agents required compliance in any shorter time, that they should have given notice accordingly.

If the owner of stocks intends to claim that a sale thereof, made by his agents, was void as being prematurely made, he should dissent at once, and notify the agents of his dissent.

Where the owner of stocks received information of a sale thereof by his agents, in May, and remained silent until September, when he demanded an account of sales, which was sent to him, with a check for the balance due him,

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which he indorsed and collected; *Held* that this amounted to a full *ratification* of the sale; and that it was too late for him afterwards, to seek to set it aside.

THE plaintiff seeks to recover from the defendants damages for selling stock without notice, and without giving sufficient time to furnish the requisite advance for a margin.

There seems to be no dispute about the facts. As stated by the plaintiff, it appears that the defendants had purchased and sold stocks for him at different times; that when it was desirable to buy or sell stocks he invariably signed a paper requesting them to buy or sell the designated number of shares. That the defendants in the present case purchased for the plaintiff 200 shares of Michigan Southern Railroad Company. That the only understanding he had with the defendants was, that they required a margin upon his operations, of ten per cent, and that when they wanted an additional margin the plaintiff would hand it in. On 20th May the plaintiff received a note from the defendants, saying "Mr. Drake would like to see Mr. Hanks." This was received about noon. The plaintiff went to the office of the defendants, when he was informed by Drake "that the Michigan Southern stock had gone down, and he wanted an additional margin of five per cent, to which the plaintiff replied, "All right; I will hand it in." No time seems to have been fixed on either side, but about half past two the plaintiff received from the defendants an account of sales of the stock. In September the defendants rendered the plaintiff an account of sales, showing a balance due the plaintiff of \$5.90, and inclosing a check for that sum, which the plaintiff received and drew from the bank. This account was furnished at the plaintiff's request. There had been between the parties only one case, previously, in which they had called for a margin, in which case the plaintiff handed it in the next day, and such payment was perfectly satisfactory. On meeting Drake after the sale, on the same day, the plaintiff complained of the treatment as being rough, and the defendant Drake replied, he

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could replace it if the plaintiff wished. In December following, the plaintiff consulted his lawyer. On proof of these facts, the defendants' counsel moved to dismiss the complaint, which motion was granted, on the ground that the rule as to pledged stock was not applicable, and that the sale had been acquiesced in by the plaintiff.

A motion for a new trial, on a case containing exceptions herein, having been made on the part of the plaintiff, at a special term, the following opinion was delivered by

CLERKE, J. It is not necessary that I should repeat what I said orally at the trial. I still think that *Milliken v. Dehon*, (27 N. Y. Rep. 364,) is analogous, and is authority in this case. The only difference is, that the transaction in the one related to cotton, in the other to stocks; and that in the one there was express authority to sell at public or private sale, while in the other there was no express direction as to the method of the sale. One distinguishing feature, however, in *Milliken v. Dehon*, is that the court discarded the notion, so long prevalent in the courts of this state, that transactions of this nature were mere pledges, and that therefore the sale must be public, with personal notice of the time and place of the intended sale. Judge Wright says in the opinion: "That it is doubtful, whether in a legal sense a pledge of the cotton was made at all, or that strictly the relation of pledgor and pledgee was created. A pledge is defined to be delivery of goods by a debtor to his creditor to be kept until the debt be discharged, (*Jones' Bailm.* 117; 2 *Kent's Com.* 577,) that there was a constructive delivery of the cotton before any relation of debtor or creditor existed, and not by way of bailment, but as a consignment. It was a peculiar contract between the parties, and is to be construed according to its own language and circumstances; and I apprehend that any apparent difficulty grows out of a perversion of it by a nice adhesion to rules at best only applicable to relations of strict and simple pledgor and pledgee." Transactions of

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this nature, in truth, are not equivalent to the delivery of goods by a debtor to his creditor to be kept until the debt be discharged, which as we have seen, is the definition of a pledge ; but they constitute a contract, in which, on the one side, a person undertakes to purchase with his own money a certain article of merchandise on speculation, an article known to be subject to frequent and great fluctuations in the market, and to hold it for the advantage of the other party, who expressly stipulates to keep his margin good, in other words, to protect the holder from the possibility of a loss for reserving the article to serve some future purpose of that other party. On the violation of this essential element of the contract, keeping the margin good, it was an equally essential element of it, following it as a matter of course, that the holder of the article, whose money purchased it in his own name, and remained vested in it, should sell it for the best price which could be procured for it ; otherwise, there would be no possibility of protection for him in holding any article of merchandise on speculation, and especially in holding articles subject to constant and frequent fluctuations, as cotton and shares of stock. Every stock broker and cotton broker would be at the mercy of any desperate speculator who may induce him to purchase a quantity of either, to reserve it in order to serve some future purpose of the speculator, on advancing a small per centage in the first instance. By refusing or neglecting to preserve the margin, according to the agreement, he is plainly in default—the contract ends on the part of the holder ; the latter is absolved from his obligation to hold the article, and he is at liberty to do with it whatever is necessary for his own indemnity. The party in default, as in all other cases, must suffer the consequences. In those sudden and frequent fluctuations it would be ruin to the holder to require him to serve notice on the other party of a public sale on a future day. It would be of the essence of injustice to cast an inevitable loss, in this way, upon the person who could not be entitled to any share of the profits, if any should accrue, instead of on him who alone

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would be entitled to them, and whose default alone exposed the holder to loss. There is nothing in the nature and purposes of such contracts to render such a result suitable or necessary.

My mind remains unchanged on the second point. The plaintiff's conduct after the sale clearly amounted to a ratification of it."

Motion for new trial denied, with ten dollars costs.

The plaintiff excepted, and appealed to this court.

Wm. A. Coursen, for the plaintiff. I. The defendants could not legally sell the stock without notice to the plaintiff of the time and place of sale. The defendants could not sell at the brokers' board. These principles are (or nearly are) axioms of law in this state. (*Brass v. Worth*, 40 Barb. 648.) The case relied upon by the defendant (*Milliken v. Dehon*, 27 N. Y. Rep. 364,) has no analogy whatever to this case. That case was decided upon a *proved special* agreement. In the case now before this court there was no special agreement, and consequently the case cited (and relied upon) had and has no support for the dismissing of the complaint, or for the respondent on this appeal.

II. The ratification alluded to in the motion to dismiss the complaint, and mentioned in the opinion of Mr. Justice CLERKE, was not much relied upon at the trial, and there is certainly no evidence of any ratification that should *take the case from the jury*. The only testimony on that point is that of the plaintiff, and his testimony clearly does not *prove ratification*. He rested under his wrongs for a time, but his remedy against the defendant existed as a legal right of action for six years. His action was brought in less than two years, and he is entitled to the benefits of the law already *in other actions* decided in his favor. (*Morgan v. Peabody*, at circuit, before *Leonard, J.*)

As to accounts stated, they come into consideration only between merchants or mutual dealers, where either party might

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render an account. Such accounts were not even remotely thought of, or understood to be in this case by either the plaintiff or the defendant.

Jas. C. Carter, for the defendants. I. The cause of action is an alleged wrongful sale of the plaintiff's stock. If the only ground relied upon for showing the sale to be tortious was, as the plaintiff intimated on his cross-examination, that there was an understanding, express or implied, that he should have until the next day to furnish the required margin, there can be no pretense that there was any evidence fit to be submitted to the jury. 1. It was for the plaintiff to *establish* this agreement by *proof*; his vague impression wholly unsupported by any other evidence, that he used the word "to-morrow," amounts to nothing. 2. Even the slight suspicion raised by this testimony is effectually negated by the fact admitted by the plaintiff, that when the sale was, on the afternoon of the day on which it was made, talked about by the plaintiff and one of the defendants, the former did not even intimate the existence of such an understanding; his conduct on that occasion was that of a man "eminently dissatisfied," but who still perceived that he had no just ground of complaint; had he then believed that the understanding between him and the defendant was that he should have until the next day to furnish the margin, he would have burst forth with indignation at such a wanton sacrifice of his rights.

II. If the point made, as to the regularity of the sale, is that it was not *public*, and no notice of the time and place was given, the solution of the question thus raised must be sought through an inquiry into the nature of the transaction and the intent of the parties to it. If, by force of some rule of law, or by implied agreement, the plaintiff was entitled to the benefit of a public sale and to notice thereof, a cause of action was shown, but not otherwise. 1. The plaintiff, indeed, disclaimed on his cross-examination any cause of action on this ground;

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but, although this disclaimer furnishes very significant evidence which will hereafter be considered of the nature of the agreement between him and the defendants, it does not preclude his counsel from asserting and insisting upon this technical ground of action.

III. When property is delivered by a debtor to his creditor as security for the payment of a debt, the transaction is called a *pledge*; the creditor has the right to sell the property and apply the proceeds toward the payment of the debt, but, in general, he cannot exercise this right of sale until he has demanded payment of the debt from the pledgor and given him reasonable notice of the time and place of the sale, and the sale must be at public auction.

IV. But the whole law relating to pledges is *ex contractu*, and based upon the presumed *intent* of the parties to the contract. The foundation of the restrictions above mentioned upon the power of sale is the presumption that the parties could not intend that the pledgor's property should be sold without an opportunity being afforded him of redeeming it, or protecting himself by being present at the sale.

V. It follows from the above, and is well established by authority, that the incidents to the contract of pledge may be shaped according to the pleasure of the parties; and the restrictions upon the power of sale may be increased, diminished, or altogether dispensed with, as it may suit their necessities or convenience. This would be so, should these restrictions be thought to be better explained upon the notion that they arise out of a principle of equity, rather than from the intent of the parties; for such an equity may be shaped or waived, as they who are entitled to the benefit of it may choose. "*Quilibet potest renunciare juri pro se introducto.*" and "*Modus et conventio vincunt legem.*" (*Broom's Max.* 538, 546. *Conkling v. King*, 10 *N. Y. Rep.* 446. *Brass v. Worth*, 40 *Barb.* 648. *Milliken v. Dehon*, 27 *N. Y. Rep.* 364. *Genet v. Howland*, 45 *Barb.* 560.)

1. The maxims above quoted are not allowed to prevail over

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considerations of public policy ; and on this ground a mortgagor's covenant with a mortgagee not to exercise his equitable right of redemption, will not be enforced ; but the analogy has never been applied to the case of a pledgor and pledgee.

VI. In order to show that the restrictions above mentioned upon the power of sale have been in any given case modified or dispensed with, it is not necessary to prove *express words*, either written or verbal, to that effect. Any evidence, competent under ordinary rules, which is calculated to throw light upon the understanding of the parties may be resorted to. A fair conclusion derived by implication is equivalent to one gathered from express language. (*Milliken v. Dehon, supra.*) 1. Whenever the intentions of the parties to an oral contract are material, all the facts and circumstances attending the transaction are material to be considered ; indeed, in cases of doubt they are for the most part the only sources from which light can be derived. 2. Especially in such a case are we to consult the object and nature of the transaction itself. (*Milliken v. Dehon, supra.*) 3. If the object which the parties to a transaction partaking of the nature of a pledge have in view *could not be achieved except by dispensing with restrictions upon the power of sale*, the conclusion that they intended to dispense with them follows with certainty ; otherwise the transaction would not have been entered into. 4. It is to be observed that those cases where the nature of the transaction itself shows that such restrictions were to be dispensed with would be, equally with those of the opposite class, the very ones in which nothing would be said upon the point of the restrictions. Parties are not apt to specially introduce terms and conditions which every one can see at a glance must be implied.

VII. It follows from what has been said that, whether the transaction upon which the present controversy arises be called a pledge, or by some other name, the question whether

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it was understood by the parties, that notice of the time and place of sale was to be given before making a sale of the stock is broadly open upon the evidence for argument and decision. Nothing can be clearer than that the expectation and intention of the parties were, and therefore their agreement was, that the plaintiff, if called upon for an additional margin, was to furnish it *immediately*, and that in default of so furnishing it, the defendants should have the right of selling the stock they had purchased at the brokers' board without notice. 1. To understand the intentions of the

parties, the transactions in which they engage must be described. The city of New York furnishes in full perfection all the conditions essential to stock speculation on a vast scale; it is the financial home of nine tenths of all the corporate bodies in the country, contains their transfer offices and is the place where the bulk of their stock is owned or held, and where nearly all the purchases and sales are made; these purchases and sales are nearly all made in one place, and by one body of men, who alone have access to it—namely—the brokers. In the same city, the aggregate daily unemployed balances of business, accumulated in the hands of bankers, banks, insurance companies and other monied institutions amount to the sum of many millions, a large portion of which can be used for no other purpose than speculation; it cannot be borrowed for a definite time, since its custodians cannot tell at what time they may want it; but it may be borrowed at a low rate of interest upon good security upon *call*, that is, to be returned the instant the demand for it is made. ✕ Brokers by reason of their employment in the purchase and sale of stocks, become the natural intermediaries through which the benefit, or the curse, as the case may be, of this unemployed capital is procured and distributed among the multitude eager to tempt fortune for her favors ✕ it is furnished to the brokers mainly upon the very stocks they purchase for their customers. Any thing ✕ which tends either to stringency in the money market, or to

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depress the value of stocks—a commercial failure—a battle—
a rumor from London or Washington—a combination of
operators with the view of affecting the market, all these
causes, sometimes to a greater, and sometimes to a less extent
impel the custodians of capital to call in their loans, and
demand additional securities from the brokers; the calls
must be instantly answered or the broker is ruined; he,
therefore, in turn, is compelled to call upon his customers,
and unless such call is forthwith obeyed, he is driven to
instant resort to his securities and sells them at whatever
price. The magic wand which sets this unemployed capital
in motion to do the work of the speculator is a *margin*; one
thousand dollars placed in the hands of his broker makes
him the master of ten thousand, but he can have it only on
the condition that he stand ready to increase the margin at
the call of the broker; the broker works for a small compen-
sation and must be made secure; the peril and the fruits of
fluctuation in the market belong to the customer; provided
with the margin, the broker will execute the customer's
orders, either to buy or sell for cash or make time contracts;
how much or how often the margin should be increased must
be left to the discretion of the broker; the laws of competi-
tion protect the interests of the customer; it is the interest
of the broker to do his work on as small a margin as possible.
A demand for an exorbitant margin with a view to sacrifice
the interests of the customer would raise a question, not in-
volved in the present case, to be disposed of on its peculiar
merits. 2. It was a transaction of the nature above described
in which the plaintiff engaged. To call it a *pledge* would
be a palpable misnomer; it is more properly designated by
the common phrase of "carrying stock," or by the slang one,
"taking a flyer;" to subject it to the general law of pledgor
and pledgee would be to apply to one transaction a system
of rules suited only, and framed only, for another and very
different one. 3. In the case of an ordinary pledge there are
several elements, nearly always present, which give character

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to the transaction and distinguish it decisively, so far as respects the questions now involved, from the case at bar. (a.) A sale of the property pledged, by the pledgee, is not contemplated; it is supposed that the pledgor will pay the debt and re-possess himself of the pledge. (b.) The exact time of the payment of the debt is not material; the creditor is deemed secure, and a proportionately less importance is attached to the question of time. (c.) Ordinarily, indeed, the debt is not *due* until a considerable period after the making of the pledge. (d.) Of course, in such cases the hazard of fluctuation in the value of the pledge does not enter as a material consideration; or, at all events, is provided against by a liberal margin in the value of the pledge over the debt. 4. On the other hand, in a transaction like the one under consideration, the conditions are very different. (a.) No property at all is actually *delivered* in pledge—it is not expected that any will be delivered. It is not expected that the customer is ever to have the *legal title* to the stock purchased; the expectation is that the broker will buy the stock in his own name, hold it in his own name, use it in any manner he pleases, and finally sell it himself, under the direction of the customer, giving the latter the profits, if any, of the transaction. (b.) It is a very distinguishing feature of the transaction that the whole substance of it consists in the buying and selling of the security, supposed to be pledged. (c.) But its most characteristic feature is the importance involved in *instantaneous action*. The *motive* for engaging in the business, is the fact that the article to be dealt in is subject to frequent and extreme fluctuations in value. The broker will not furnish the money to his customer for any *definite period of time, even the smallest*. The margin is small, may be overcome by the fluctuations of a few hours, and the security of the broker requires instant attention to his call. (d.) The exact market value of the stock is known at each hour of the day, and it cannot well be sold in the proper market at a price above or below the rate for the instant; consequently

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there is not the slightest occasion for notice of time and place of sale, in order to protect the owner. (e.) The idea that such an article is to be sold at a public place, such as the Merchants Exchange, where it would be, if anywhere, sacrificed, of course has no place in the understanding of the parties. 5. We think the conclusion is not to be avoided that such a transaction is not properly styled a *pledge*, but that howsoever styled, the ordinary rules requiring notice of the time and place of the sale of the security, and that the sale should be in a public place, are not applicable; were these rules applicable, the business could not be done as it is done. 6. The transaction cannot be more briefly designated than by defining it to be an employment of a broker by his principal, to furnish the requisite means and conduct a speculation according to the directions of the latter. The agent must obey his instructions, so long as the principal complies with the main condition of the contract on his part, namely: To keep the broker at all times secure. 7. In the case of an ordinary consignment of merchandise for the purpose of sale, where advances have been made upon the strength of the consignment, the consignee must obey his instructions so long as his principal keeps him secure, but a failure in this respect entitles the consignor to sell for the purpose of re-imbursement, and it is not pretended that notice of the time or place of sale is in such a case requisite, or that the sale must be public; and yet such a transaction has far more of the elements of an ordinary pledge than the one we are considering. (*Parker v. Brancker*, 22 Pick. 40. *Pothonier v. Dawson*, *Holt's N. P. Rep.* 383.)

VIII. The views above set forth are decisively sustained by the highest authority. The Court of Appeals has held, in a case more nearly resembling a pledge than the present, that whether the ordinary rules of the law of pledge are to be applied, depends altogether upon the intention of the parties; that a principal mode of ascertaining such intention is to consider the nature of the business engaged in and its require-

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ments, and that such operations as the one under discussion furnish conclusive evidence that the technical rules above mentioned were intended to be dispensed with. (*Milliken v. Dehon, supra.*) 1. The decision in *Brass v. Worth*, (40 Barb. 648,) so often relied upon to sustain an opposite doctrine is erroneous in this only, namely: The court assumed that the contract was *silent* upon the subject of how the stock was to be sold, whereas had they interpreted it by the light to be drawn from a *consideration of the business itself*, as the court did in *Milliken v. Dehon*, it would have been found to speak a not ambiguous language.

IX. The sale was fully ratified by the plaintiff, and such ratification constitutes a complete defense to the action. 1. Between strangers, if a right of action arises in favor of one by the breach of contract or wrong on the part of another, such right of action cannot in general be extinguished except by payment, release, or accord and satisfaction; but where the relation of principal and agent subsists the case is different; the ratification of the act of the agent is here equivalent to an original authority. (*Story on Agency*, 239 to 260. *Smith v. Cologan*, 2 T. R. 188, n. *Towle v. Stevenson*, 1 John. Cas. 110. *Cairnes v. Bleecker*, 12 John. 301. 2. The dictum to the contrary in *Andrews v. Clerke*, (3 Bosw. 585,) is not sustained by the cases cited, and is clearly erroneous. 3. Silence on the part of the principal when informed of the facts, is equivalent to express acquiescence. (*Cairnes v. Bleecker*, 12 John. 301. *Story on Agency, ubi sup.*) The plaintiff was informed of the sale and fully approved of all the facts on the very day of the sale; he had an interview with one of the defendants thereafter and on the same day, and did not venture to intimate that there had been any violation of his rights; he remained silent for five months, and then demanded his account, which was furnished him, with a check for the balance due to him; he received and appropriated this balance, and yet made no claim, and it was not until three months after that, that he ventured to ask even himself whether a lawsuit could not be contrived

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against the defendants, and it does not appear that any complaint was ever made to the defendants until the bringing of the suit. 4. The general ground upon which the rule of ratification rests, is that the agent when acting in good faith, is entitled to know at once whether his conduct is approved or disapproved, otherwise he is in danger of being misled, and loses the opportunity of taking proper precautions to protect himself against the consequences of a claim upon him by his principal; besides this, courts are not inclined to lend their ear to those who, after once having, with full knowledge, acquiesced in the acts of their agents, turn round and make claims upon them after the lapse of time, and the possible destruction of evidence; such conduct does not comport with the mutual candor and confidence which the law requires between principal and agent. 5. The evidence of ratification was overwhelming.

INGRAHAM, J. I concur with the court below, that this transaction is not to be considered a pledge of stocks for the payment of a sum of money advanced thereon, and requiring a notice of the time and place of selling the pledge, to make the sale legal. This was a purchase by the defendants as agents for the plaintiff, with an advance of money by the defendants on the plaintiff's account, upon the condition that the plaintiff should deposit a margin of ten per cent, and deposit a further margin when required by the defendants. Under such an agreement, the defendants had a right, upon the plaintiff's failing to deposit a further margin when required so to do, to sell the stock and close the transaction. This right to sell arises from the previous violation of the contract on the part of the person for whom the stock was purchased, and who, by neglecting to perform on his part, terminated the obligation of the defendants to hold the stock any longer, and left them at liberty to sell the stock for their own protection. The notice which the law requires in the case of the sale of a pledge of stock as security for the pay-

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ment of a sum of money advanced thereon is not required, in such a case.

But it is very clear from the terms of the contract, that before the plaintiff could be placed in the wrong, and before he was called upon to deposit any additional margin, the defendants should give him notice that his margin was diminished, and that they required a further margin. It is also clear, and the defendants' counsel admits, that it is equally necessary that a reasonable time to comply should be allowed, before the stock could be sold.

I had occasion to examine a similar question in *Genet v. Howland, et al.* (45 Barb. 560;) but in that case the stock was pledged as security for a note payable on demand, and a notice of intent to sell was held to be necessary. In that case, however, as well as in this, if a notice of any thing to be done was necessary, it was equally necessary that a reasonable time within which to do the act required should be given. Any other rule would be to render any notice useless.

In *Milliken v. Dehon*, (27 N. Y. Rep. 364,) Wright J. says: "Two things must concur to put the plaintiff in default; a decline in the market below the margin stipulated in the contract, and a demand that the plaintiff should make good such margin." In that case the demand was to be complied with the next day, and that was held to be sufficient.

In the present case, a notice of not more than two hours was given between the demand of an increase of the margin and the receipt of an account of sales. In all probability, the time between the notice and the sale was much less, because, after the sale was made, the defendants had to return to his office, make the necessary entries, and account of sales, and send the same to the plaintiff. No proof is given when the sale was made. I do not intend to say if the plaintiff had been notified to deposit a further margin within two hours, or even less, that it would not have been sufficient, but under the circumstances of this case, I very much doubt whether we could hold, without further evidence, that rea-

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sonable time for performance had been given. There is no proof of usage, and no proof of any facts from which the court can decide whether such reasonable time was allowed. To decide this point as matter of law, the facts should appear by which the court can say the party was able, within the time given, to do the act required, and therefore that the time was reasonable.

All the evidence on this subject is that furnished as to a former transaction between the same parties. In that case the same notice was given, and the defendants waited until the next morning, when the deposit was made, and it was perfectly satisfactory. A precisely similar request was made in this case, and without any notice that the party was required to act in any shorter time, I think the plaintiff had a right to suppose that the same course of dealing which had taken place on the former transaction, and was satisfactory to the defendants, was expected in the present case, and if the defendants required any shorter time, that they would have given notice accordingly.

But if it be conceded that the sale was prematurely made, I am of the opinion that the subsequent acts of the plaintiff amount to a ratification of the defendants' acts, and that he cannot now object to it. For the purpose of this purchase of stock, the defendants were the agents of the plaintiff, and when they sold the stock and rendered the account, it was the duty of the plaintiff to have dissented at once. Had the plaintiff so dissented, the defendants could have replaced the stock without loss. They received information of the sale on the 20th May, and remained silent. In September he demanded an account of sales, which was sent to him, with a check for the balance due him. This check, payable to his own order, was indorsed by him, and the money drawn from the bank, and it was not till some months after, that this action was brought.

If the plaintiff did not intend to assent to this transaction of the defendants, he should at once have notified them

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thereof. In *Bridenbecker v. Lowell*, (32 Barb. 9,) Allen, J. says: "The party not having dissented within a reasonable time, an assent to or ratification of the acts will be presumed. When the principals received a letter informing them of what the agent had done, in July, and they were silent until October, and then complained, they were considered to have waived any right of action."

Nor could the plaintiff avail himself of part of the transaction and then repudiate. He accepted payment of the balance on the account as rendered. This ratification as to a part is the ratification of the whole. (*Story on Agency*, 250.)

The plaintiff, however, claims that such acts are not a ratification, unless he had full knowledge of his rights. I do not understand such to be the rule, but that the party must have full knowledge of the facts and circumstances of the transaction. Such facts were all known to the plaintiff. The sale, the price, the balance due, and the circumstances attending the notice, were all within his knowledge, and with full knowledge of the transaction he demands an account of sales, and receives a check for the balance, which he indorses and collects. This amounts to a full ratification of the sale, and it is too late for him now to seek to set it aside.

Judgment should be affirmed, with costs.

LEONARD, J. I think the defendants expected the plaintiff to make the margin good before the meeting of the second board. The plaintiff evidently neglected this, and the defendants were not required to wait longer. Perhaps evidence should have been given of these facts, which the court cannot be supposed to know. At all events, the ratification is clear, and I concur with Judge INGRAHAM, in his conclusion on that question.

J. C. SMITH, J. also concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, June 8, 1867. *Ingraham, Leonard and J. C. Smith*, Justices.]

DEXTER L. SHELDON vs. FANNY M. RAVERET, impleaded, &c.

The proper charges and expenses of converting a security into money, are first to be deducted from the gross proceeds; and it is the balance, only, which is applicable to the discharge of the debts.

This is especially so, when the creditor is also the factor of the goods; he having a lien for all those charges, which cannot be divested without his consent.

The factor is accountable only for the balance, after deducting his charges and expenses.

APPEAL by the plaintiff from a judgment entered upon the report of a referee, directing a reconveyance to the respondent, and dismissing the complaint as to her, with costs.

The action was brought originally against this respondent, and Francis Raveret, her husband. Mr. Raveret subsequently died, and by order of this court the action was continued against Mrs. Raveret, individually, and as executrix of Francis Raveret, deceased.

The complaint was filed against Mr. Raveret as principal, and Mrs. Raveret as his surety, demanding an accounting between the plaintiff and said Francis Raveret, and that the sum found due to the plaintiff be collected out of certain real estate belonging to Mrs. Raveret, and which was conveyed to the plaintiff by her, and her husband, by deed absolute on its face, but in fact given as collateral security for moneys to be advanced to her husband by the plaintiff. The defendants appeared, and interposed separate answers. Mrs. Raveret, in her answer, alleges that the premises described in the deed was her separate property, and that the deed mentioned in the complaint was executed and delivered by her to the plaintiff solely as collateral security for such advances as might be made by said plaintiff for her said husband, during the period of one year next after the delivery of said deed, as the plaintiff well knew; and that said deed was not subject to all the conditions and covenants contained in the contract of May 10, 1860, &c. Other defenses are also interposed.

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The cause was afterwards referred to Hon. John Slosson, as sole referee, to hear and determine the same. After hearing the proofs and allegations of the parties, the referee decided that the plaintiff was entitled to judgment against the estate of Francis Raveret, deceased, in the sum of \$1870.67, with costs, to be levied out of said estate, and that Mrs. Raveret, personally, was entitled to judgment against the plaintiff for a reconveyance of said real estate, and that the complaint be dismissed as to her, with costs. By a supplemental report, the referee adjudged the plaintiff entitled to a quantity of tools, the value of which was to be applied in reduction of the amount found due to the plaintiff in the former report ; and judgment was entered accordingly.

From the judgment in favor of Mrs. Raveret, individually, the plaintiff brought this appeal.

The following are the leading facts pertinent to the issue between the parties to this appeal : On the 10th of May, 1860, Francis Raveret, now deceased, entered into an agreement in writing, of that date, with Dexter L. Sheldon, the plaintiff, whereby the former transferred to the latter very considerable personal property, consisting of stock, tools, brushes manufactured and in process of being manufactured, and agreed to deliver to Sheldon all the brushes he should manufacture during the term of one year from the execution of the contract. Sheldon agreed to advance money to Raveret, and to receive and sell the brushes, for which he was to have a commission of ten per cent on such sales. It was further provided, that within ten days, Raveret should cause to be executed and delivered to Sheldon "a good and sufficient deed, or conveyance, signed by himself and wife, of the premises now owned by said party of the first part, (Raveret,) or his wife, in the village of Lansingburgh, which conveyance and premises shall be held by said party of the second part, (Sheldon,) as collateral security for the repayment of the advances so made, and to be made as aforesaid by said party of the second part to the said party of the first part, and for

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the full and faithful performance of the covenants herein contained, to be kept and performed by said party of the first part, and that upon the full performance whereof said premises shall be reconveyed by said party of the second part."

At the time of the execution of this agreement, Mrs. Raveret was, and for more than four years had been, the legal owner of the real estate mentioned in said agreement; and the deed thereof to her was recorded in Rensselaer county, June 9, 1856, of which the plaintiff had notice when that agreement was entered into. And the referee so found.

After the execution of this agreement, and previous to the giving of the deed by Mrs. Raveret, hereinafter mentioned, the plaintiff made advances to Francis Raveret, in money and merchandise, to the amount of \$603.84. On the 21st day of May, 1860, the plaintiff, having the deed in question prepared, came to the residence of the respondent, in the village of Lansingburgh; and she was then and there requested by her husband, in the presence and hearing of the plaintiff, to execute the deed as collateral security for advances to be made by Sheldon to her husband for one year from that date. The plaintiff made no objection to the terms and conditions stated by Raveret to his wife. She thereupon consented to execute the deed on that condition, and did so; but she had never heard of the previous arrangement between Sheldon and her husband, as the proof showed, and as the referee found.

Mrs. Raveret, in executing the deed, acted as surety merely for her husband, and the plaintiff accepted it with full knowledge of the purpose for which it was given; and such is the finding of the referee.

During the year next after the execution and delivery of the deed, Mr. Raveret received from the plaintiff, by way of advances and in payment for brushes belonging to him, and disposed of under the contract of May 10, 1860, money and merchandise, which, with the interest thereon, amounted to \$11,895.83; but it does not appear what proportion of it was for advances proper, nor how much thereof was payment on

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account of brushes sold by the plaintiff under said contract. About \$900 of such advances or payments were applied by Francis Raveret in the settlement and satisfaction of a judgment and mortgage lien on the premises, given as security for his own personal debt.

On the 10th of May, 1861, one year from the commencement of the business, the plaintiff held, as security for his advances under said contract, brushes belonging to the principal debtor, Francis Raveret, of the value of \$7000, and upwards. And besides this, the principal debtor, as late as July 11, 1861, had possession of personal property of the value of \$1800, the title to which was, by the terms of the contract of May 10, 1860, vested in the plaintiff as security for his said advances. Of these facts, however, Mrs. Raveret had no knowledge or notice ; she did not even know of the existence of the original agreement between her husband and the plaintiff until after this action had been brought. The only advances made by the plaintiff to Raveret, after May 10, 1861, were \$101.24, and those were made previous to August 15, 1861. On that day a second agreement was entered into between Francis Raveret and the plaintiff, as follows :

“ This will certify, that whereas an agreement was made and entered into between Francis Raveret, of Lansingburgh, in the state of New York, and Dexter L. Sheldon, of the city of New York, on the 10th day of May, 1860, by which a lot of brushes were to be, and were, manufactured, many of which are now on hand, unsold ; and whereas said Raveret is desirous and anxious that said brushes shall not be forced upon the market, and sold in these depressed times, at prices greatly reduced, and ruinous not only to the present sales but, to his future business, having been offered only fifty per cent upon the worth, and that on 12, 18 and 24 months. Now, therefore, in consideration of the above, I, the said Francis Raveret, hereby promise and agree to and with the said Dexter L. Sheldon, to pay or allow to him a sum equal to five per cent on all said brushes now on hand, unsold, to hold

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them from the tenth of May last, until the 1st of September next; and for all those remaining on hand, unsold, on the said 1st of September, a further sum, equal to four per cent, to hold them until the 1st of January next; and for all those remaining on hand, unsold, if any, on the said 1st of January, a further and additional sum equal to three per cent more, to hold them until the 1st of May next. And upon all sales of said brushes, by whomsoever made, prior to said first of September, said Sheldon to be allowed or paid a sum equal to seven and a half per cent, and upon all sales made from said 1st of September to said 1st of January, he is to be allowed or paid a sum equal to six and a quarter per cent, and upon all sales from said 1st day of January to said 1st of May, he is to be allowed and paid a sum equal to five per cent; and said Sheldon is to make no further charge for holding, storing and insuring said brushes during said time; all sales to be made on approval of said Sheldon, and at risk of said Raveret. This to be canceled at any time after the claims of said Sheldon against said Raveret are paid." This was signed by said Raveret only.

The defendant insisted that the legal effect of this agreement was to extend the time of payment, create a new obligation against the principal, in favor of the creditor, and therefore to discharge the surety. The commissions, as claimed by the plaintiff under the first agreement with Francis Raveret, amounted to \$690.79. The aggregate amount of advances and payments made by the plaintiff after the deed was given was only \$12,600.91, which included interest on the same, and interest on the \$608.84, previously advanced, and also interest on the entire commissions claimed. Add to the above amount all the commissions claimed under the first contract, as before shown, and the sum total is \$13,291.70. It was proved, and also found by the referee, that the whole amount realized by the plaintiff for sales of brushes down to the time of the trial, was \$13,426.18.

In his account against the principal, the plaintiff charged,

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and was allowed by the referee, the sum of \$572.33, for interest on commissions, down to the date of the referee's report.

E. R. Bogardus, for the appellant. I. The referee erred in finding as matter of fact that Mrs. Raveret had no knowledge of the existence of contract A, nor of its terms or contents. The referee discredits the defendant's evidence in every other particular than this.

II. That the referee erred in finding as matter of fact, "That in executing and giving the deed, Mrs. Raveret acted simply as a surety for her husband, by the pledge of her property, for the repayment of advances to be made to him by the plaintiff, for the period of one year; and the plaintiff in accepting the deed accepted it with knowledge that she was pledging her property as surety only for the purpose aforesaid.

III. The property is liable to the appellant for his advances to remove liens thereon. (a.) The defendant, Francis Raveret, became indebted to the appellant for advances during the year 1860 and 1861, (exclusive of payments thereon,) in an amount exceeding \$1000, and \$905 of this sum was for advances to remove liens against the property described in schedule B. (b.) This suit asks equitable as well as legal relief, and it is not equity that real estate shall be relieved from that part of a legal debt against one defendant, which is equitably a charge upon the property of the other defendant. (c.) The advances to relieve liens on the real estate were with the knowledge and at the request of Mrs. Raveret. (d.) Even admitting that as against Mrs. Raveret, the appellant cannot deduct his commissions on sales of goods delivered to him by her husband, on which to realise money to repay advances, still she cannot claim the benefit of moneys belonging to the appellant to discharge liens on her property. (e.) At the expiration of the year, after execution and delivery of the deed, Mr. Raveret had not paid the appellant his advances, to say nothing about commissions; the advances exceeded payments by \$7000 at that time.

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IV. The finding of the referee that the security was "for repayment of advances to be made to her husband by the appellant for the period of one year," will not avail Mrs. Raveret. (a.) It is unquestionably the fact that such advances were not repaid within one year, nor were they at all, unless the appellant appropriated his own commissions (or earnings) to such repayment. (b.) Does the finding of the referee mean that the advances were to be made in one year, or that the advances were to be repaid in that time? If the former, then there can be no question about the appellant's rights, for then she pledged her property as surety, the same as the contract provided. If the latter, then as the advances were not repaid within the year, her property became liable to the indebtedness accrued at that time, and any arrangement made between her husband and the appellant for the payment thereof, she is bound by, excepting so far as they may have delayed the time of payment so as to prevent the surety from obtaining her rights. (c.) The factor has a right to appropriate moneys coming into his hands to such of the liabilities of his debtor as he chooses, unless otherwise agreed. (d.) The appellant (his debtor neglecting) made application of moneys to his debt for commissions before advances.

V. The referee erred in his ninth conclusion of fact, "that the whole amount realized by the plaintiff from sales of brushes, effected by him under said contract, down to the trial of this action, was \$13,426.18," and also in his first conclusion of law, "that the plaintiff having been overpaid such advances and interest, the said property is discharged and Mrs. Raveret is entitled to a reconveyance of the property." (a.) The evidence refutes both of these conclusions. (b.) The factor has a lien on the moneys realized from sales of his principal's goods, and cannot be compelled to pay it to his principal. (c.) So much of the moneys realized from the sales of the brushes as the appellant was entitled to retain

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for his expenses and services in selling, was his property, and not that of Mr. Raveret, and Mrs. Raveret has no right to compel him to apply it for her benefit, any more than Mr. Raveret could do so. (d.) Mr. Sheldon stood in the same relation to Mr. and Mrs. Raveret, so far as the selling of the brushes was concerned, (even under the 6th finding of fact,) as any outside factor who had the right to retain his commissions before applying the proceeds of his sales to the discharge of Mr. Sheldon's advances to Mr. Raveret.

R. A. Parmenter, for the respondent. I. It is alleged in the complaint, established by the evidence, and found by the referee, that the deed from Mrs. Raveret, although absolute on its face, was nevertheless given as collateral security for the payment of the debt of her husband.

II. The deed was executed, acknowledged, and delivered to the plaintiff in person, on the 21st day of May, 1860. At that time Mrs. Raveret was utterly ignorant of the agreement then existing between her husband and the plaintiff. She was asked in the presence and hearing of the plaintiff, to execute the deed as surety of her husband for advances *to be thereafter* made to him by the plaintiff, during the period of one year. The plaintiff, as well as her husband, entirely neglected to inform her of the existence of the agreement already executed between the principal parties, and of the advances already made to her husband. The obligation of a surety being held in all cases to be *stricti juris*, it follows that the liability of Mrs. Raveret, under the deed, is limited to the precise purpose for which she was requested to become surety. In *Gates v. McKee*, (3 Kern. 237,) Denio, J. said "that the surety is not to be held beyond the very precise stipulations of his contract."

III. There is no legal or equitable foundation to support the claim of the plaintiff, that Mrs. Raveret is liable as surety for the payment of the \$603.84, advanced by him to her husband *previous* to the execution of the deed. The

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plaintiff should have asserted such claim when the collateral security was being given, and then the surety could have easily declined to incur the proposed responsibility. And the same considerations justify the rejection by the referee of the claim for commissions, under the agreement of May 10, 1860, of the existence of which the surety had no notice until this action was brought.

IV. It clearly appears that after the last advance had been made by the plaintiff, and the last shipment of brushes made by Francis Raveret, and previous to the second agreement of August 15, 1861, the plaintiff held the possession and legal title, by way of security, to property belonging to the principal debtor, exceeding in value his entire demands against Francis Raveret. And it is submitted that in respect to such property, the plaintiff was bound to convert such securities into money, and apply the same in extinguishment of his demand, or else surrender those securities to Mrs. Raveret, the surety, upon the payment by her of such demand. Nothing of that sort was attempted by the plaintiff; he did not even apprise the surety of the non-payment of the debt, to secure which her deed had been given. On the contrary, he sought the principal debtor and entered into new schemes and arrangements with him, manifestly against the interest of the surety. (*See 1 Story's Eq. Jur.* §§ 324, 325.)

V. It is also submitted that in legal effect the second agreement entered into between the plaintiff and Francis Raveret, on the 15th day of August, 1861, operated as an extension of the time of payment of the demands then due from Raveret to the plaintiff, until the following May. The language of the instrument is peculiar. It recites that "Raveret is desirous and anxious that said brushes shall not be forced upon the market and sold in these depressed times." Forced by whom? By Sheldon, not as agent, but as creditor, who held them by way of security for a debt already due. "Now; therefore, in consideration of the

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above,"—that is, in consideration that Sheldon will forbear his demand, and not force the brushes upon a dull market and sell at ruinous prices—"I hereby promise," &c. And such extension having been given, as the referee finds upon adequate proof, without the knowledge or assent of Mrs. Raveret, it discharged her as such surety, and also the obligation created by her deed. The principle is well settled, that giving time to the principal debtor, though it be but a day, without authority from the surety, discharges the latter. And though the surety, as in the case at bar, is not personally bound, but has simply mortgaged her separate estate by way of security for the debt of her husband, her property is released by an agreement with her husband without her assent, extending the time of payment. Nor is the surety deprived of the benefit of this rule where such agreement is founded upon an usurious consideration.

Again. The second agreement superseded the one of May 10, 1860, and not only enlarged the time of performance, but *varied* materially the terms of the obligation created by the first agreement, and that having been done without the assent of the surety, she is discharged. These propositions are supported by undoubted authority. (*Rathbone v. Warren*, 10 *John*. 587. *Reynolds v. Ward*, 5 *Wend*. 501. *Gahn v. Neimcewicz*, 11 *id.* 312. *Miller v. McCan*, 7 *Paige*, 451. *La Farge v. Herter*, 5 *Seld.* 241. *Smith v. Townsend*, 25 *N. Y. Rep.* 479. *Billington v. Wagoner*, 33 *id.* 31. *Pitts v. Congdon*, 2 *Comst.* 352. *Coleman v. Wade*, 2 *Seld.* 44. *Fellows v. Prentiss*, 3 *Denio*, 512. *Bangs v. Strong*, 7 *Hill*, 252; *affirmed in* 4 *Comst.* 315.)

It is further submitted that after this second agreement took effect, the plaintiff could not have maintained an action against Francis Raveret for an accounting, previous to the 1st day of May, 1862. And, if that be so, the plaintiff, during that period, on being fully paid by the surety, could not have given the latter an *immediate* right of action against the principal debtor, nor could he, without violating the

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spirit of the contract, have surrendered to the surety the securities he held belonging to the principal. The letter of May 21, 1861, from Sheldon to Raveret, indicates the nature of the new arrangement as contemplated by the creditor.

VI. If it shall be again urged that the second agreement did not extend the time of payment, and was obligatory only on Francis Raveret, who executed it, we answer that *such* is not the true construction of the paper; but if it were, the contract would be void for want of mutuality, and the plaintiff would have no tenable ground for claiming, as he does, \$1307.37, for commissions under it.

VII. In any view of the case, this second agreement is void as between the creditor and surety of Francis Raveret. When it was made the entire property was held by Sheldon as security for advances previously made to the principal debtor. Mrs. Raveret, as such surety, had an equitable lien on or interest in whatever securities the creditor held belonging to the principal debtor. And the creditor had no right at law, or in equity, to deal with such securities to the prejudice of the surety. Nor could he have surrendered the brushes, or any part of them, to Mr. Raveret, and afterwards enforced his demand against the surety. And for the same reason Sheldon had no authority to make a private arrangement with his debtor creating a new lien, charge, or commission upon those bushes, or the proceeds thereof, to the amount of \$1307.37, or any other amount. She had the right to be subrogated, on payment of the debt, to the securities held by the creditor. (*Matthews v. Aikin*, 1 *Comst.* 595.) The paramount rights of the surety intervened. The actual expenses attending the sale of the brushes have been charged in the general account, as advances, and independently of the instrument, there is no proof as to the value of the services and storage, for which the charge of \$1307.37 was made. Nor is this position overthrown by the illusory theory advanced by the plaintiff, that the moneys sought to be retained by him as commissions, being a primary

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charge upon the fund, never equitably belonged to the principal debtor. But the answer to that is, that without the assent of the surety the creditor and debtor had no legal right to create any new lien upon these brushes, or the proceeds thereof.

VIII. It is not pretended, on behalf of the plaintiff, that any specific appropriation has been made by him, of the moneys realized from the sale of brushes. It was an open account down to the time of the trial. And it remains for the law to make the appropriation according to the justice of the case. That is the rule, at law and in equity. (*Allen v. Culver*, 3 *Denio*, 290.)

IX. It appears from the undisputed evidence that the plaintiff has been reimbursed for the entire advances made by him, and for all the commissions claimed by him under the first contract, and over one half of his claim under the second agreement. The aggregate amount of such advances, including *interest* charged on commissions under both contracts, is \$12,600.91. The interest so charged on the commissions claimed, and improperly allowed, even against the principal debtor, is \$572.33. Strike out this last item, and it leaves the sum of \$12,028.58, which embraces all the advances so made, with interest thereon. Now, as the referee truly finds, the plaintiff has realized in cash from sales of brushes, held as security, the sum of \$13,426.18. And that leaves in his hands, to be applied on his commission account, \$1397.60. (2 *Wend.* 413. 5 *Cowen*, 587. 2 *Caines*, 226. 4 *Cowen*, 496.)

X. Upon every question of fact decided by the referee, adversely to the plaintiff, there was conflicting evidence, and his findings in that respect will not, therefore, be disturbed by the appellate court. This rule is too familiar to require the citation of authority in its support.

XI. The plaintiff's exceptions to the referee's omission to find additional facts and conclusions of law, should not be entertained by this court, upon this appeal. The remedy of

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the plaintiff would be by a motion to compel the referee to pass specifically upon the findings proposed. But it does not appear from the case that the referee was ever requested to pass upon such questions. (*Heroy v. Kerr*, 21 *How. Pr.* 409, 422.)

XII. The judgment of the referee, discharging the surety, and ordering a reconveyance of the premises, is manifestly right, and being so, it should not be disturbed, even though his reasons for it should not receive the unqualified approval of the court of review. But it is submitted that the findings of fact and conclusions of law found against the plaintiff, are correct.

CLERKE, J. If I understand this case correctly, the only question involved in it is, whether the plaintiff had a right to appropriate the proceeds of sales which he made as factor, first for the payment of his commissions, before any of the proceeds could be accredited to the payment of advances made to the husband, the principal debtor, to secure which, one of the defendants, the wife, mortgaged her real estate.

The property was sold by the plaintiff as factor for the husband, and consisted of brushes ; and at the expiration of the time fixed for the continuance of the agency and advances, they were sold ; and they failed to realize a sufficient sum to satisfy the advances ; leaving a deficiency of \$1870.67. The referee found, however, that as this balance in favor of the plaintiff was caused by deducting commissions on the sales, the mortgaged property was not liable for this balance, and directed that it should be reconveyed to Mrs. Raveret ; it having been conveyed to the plaintiff by a deed absolute on its face, although, as we have seen, given as collateral security for money to be advanced to her husband by the plaintiff.

In my opinion the referee was clearly in error. The plaintiff having stood in the two relations of pledgee and factor to the principal debtor before any of the proceeds could be made available for the satisfaction of the advances, the commis-

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sions must be first deducted. These commissions include charges not only for selling the goods, but for holding, storing and insuring. These are indispensable preliminary expenses, before a fund can be realized out of the goods, for the payment of the advances. It is scarcely necessary to urge that the proper charges and expenses of converting a security into money are first to be deducted from the gross proceeds, and that it is the balance, only, which is applicable to the discharge of the debt.

This is especially so, when the creditor is also the factor of the goods ; for he has a lien for all these charges, which cannot be divested without his consent. The factor is accountable only for the balance, after deducting his charges and expenses.

The judgment should be reversed, and a new trial ordered ; costs to abide the event.

LEONARD, J. The agreement of August 15, 1861, is not an extension of the time of payment. The plaintiff owed no obligation to Mrs. Raveret, as surety for her husband, to sell the brushes. The plaintiff could, without interference with her rights, agree to hold the brushes. No defense is set up by Mrs. Raveret of an extension of the time of payment to her husband, or injury from delay in selling the brushes.

Brother CLERKE is clearly right on the question of the amount of the proceeds of sales applicable to the payment of the advances.

WELLES, J. also concurred.

New trial granted.

[NEW YORK GENERAL TERM, June 3, 1867. *Leonard, Clarke and Welles, Justices.*]

**THE PEOPLE, defendants in error, vs. JOHN J. SKEEHAN,
plaintiff in error.**

On the trial of an indictment for murder, it appeared that the meeting of the accused and the deceased was casual, they having had no previous acquaintance; that the accused, taking offense at some trifling remarks made by the deceased, in passing him in the street, near midnight, stabbed the deceased with a knife, which resulted in immediate death. *Held*, that the killing, though groundless, and probably without any intent to take life, was "by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual;" and that the evidence would have justified a verdict of murder in the first degree; but if that crime was not established, it was clearly manslaughter in the third or fourth degree. That if not one of these offenses, there was no crime committed, within the definitions of the statutes. *Held, also*, that the offense was not within the definition of murder in the second degree, and the jury ought not to have been instructed that there was evidence upon which they could be permitted to find such a verdict.

A party is not permitted to assert, or to present evidence to show, that one state of facts is true, and afterwards to assert or prove to the court that his prior evidence was untrue, or not to be relied on. But where a witness has given evidence against the side for the support of which he has been called, and the court can perceive good grounds for apprehending that the witness has testified under a mistake of the facts, or intentionally falsely, and there is no bad faith on the part of the party producing the witness, he is allowed to give evidence explaining, or even contradicting, his own witness.

WRIT OF ERROR to the New York general sessions.

John Sedgwick, for the prisoner.

A. Oakey Hall, (dist. atty.) for the people.

By the Court, LEONARD, P. J. The prisoner was indicted and tried in the court of general sessions, of the city of New York, for the crime of murder, committed in August, 1866.

The meeting of the accused and the deceased was casual; they had no previous acquaintance. The accused, taking offense at some trifling remarks made by the deceased in passing him, near midnight, which were understood by the companions of the deceased to have no reference to the accused

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or to those in company with him, but which, there is reason to believe, the accused misapprehended, and understood to be an impertinent allusion to the hat worn by him or one of his company, stabbed the deceased with a knife, near the arm pit, opening an artery, which resulted in immediate death.

The killing was groundless, probably without any intent to take life, but "by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual." The evidence would have justified a verdict of murder in the first degree; but if that crime was not established, it was clearly manslaughter in the third or fourth degree. The verdict of the jury was "guilty of murder in the second degree."

The statute of 1862, now in force, defines murder in the second degree to be the killing of a human being, when perpetrated without any design to effect death, by a person engaged in the commission of any felony, where it is not murder in the first degree, nor one of the different degrees of manslaughter, nor justifiable or excusable homicide. (*Laws of 1862, ch. 197, § 6. 5 R. S. p. 149, Edmonds' ed.*)

The indictment does not charge, nor does the evidence show, that the accused was engaged in the commission of any felony, except the killing of Thomas Wright, for which he was tried. The judge charged the jury as follows, among other things, viz. "If you are not satisfied on the whole of the testimony, that it is a case of murder in the first degree, or one of justifiable or excusable homicide, you can convict, if the evidence warrants it, of murder in the second degree, or of manslaughter in the third or fourth degree." This was clearly erroneous.

The case was one of murder in the first degree, or manslaughter in the third or fourth degree. If not one of these offenses, there was no crime committed, within the definitions of the statutes. It was not within the definition of murder in the second degree, and the jury ought not to have been

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instructed that there was evidence upon which they could be permitted to find such a verdict. The prisoner was proven to be of good character, quiet and peaceable, and the verdict was undoubtedly a merciful one, with which, it might reasonably have been expected by the court, that the prisoner and his counsel would have found much reason for congratulation. The accused was entitled, however, to be tried according to the rules of law; and it is possible that his good character might have raised such a doubt with the jury that they would, if instructed strictly according to the law, have found him guilty of manslaughter only, or even wholly have acquitted him. He has cause to apprehend a more unfavorable result at another trial.

The other objections taken by the prisoner's counsel, are wholly unfounded. The principal one relates to the recalling of certain witnesses, and permitting them to give evidence contradicting that given by others who were present at the homicide, all of them having been produced on behalf of the people. A party is not permitted to assert or present evidence showing one state of facts to be true, and afterwards to assert or prove to the court that his prior evidence is untrue, or not to be relied on. This rule applies to prevent bad faith in presenting a cause. A different rule might be interpreted as lending countenance to perjury. Here all the witnesses who knew any of the facts or circumstances, attending the homicide, were put upon the witness' stand to give their version of what they saw or knew. There is no reason to suppose that the counsel for the people attempted to offer any evidence which he knew to be false. Where a witness has given evidence against the side for the support of which he has been called, and the court can perceive good grounds for apprehending that the witness has testified under a mistake of the facts, or intentionally falsely, and there is no bad faith on the part of the party producing the witness, he is allowed to give evidence explaining, or even contradicting, his own witness. In this case, the two companions of the prisoner

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stated the occurrence quite differently from the two who were with the deceased, and also from the policeman, who was near at the time of the occurrence, and on the spot before the death of Wright, and made the arrest ; and they also stated many occurrences quite differently from each other, in many particulars. The policeman and one of the companions of the deceased were recalled, and gave evidence in respect to certain facts testified to by the companions of the prisoner, not mentioned by the others who were present, and had an equal opportunity to see and hear all that the companions had testified to. This was objected to by the prisoner's counsel as a contradiction of evidence given by witnesses called on behalf of the people. The evidence so objected to was clearly within the rule I have above adverted to, and was properly admitted.

There were also some exceptions taken to the statement, by the judge, of facts proven by the witnesses in the case. It is well settled that this is no ground of valid exception, and I am unable to perceive that any injustice was done, or even any mistake made in the statements referred to.

It is unnecessary, from the view I have taken of the charge, to examine more minutely all the grounds of exception taken by the prisoner's counsel. I find no other error occurring in the case, except the one mentioned, but upon that ground the judgment should be reversed, and the case remitted to the sessions for a new trial.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clerks and Welles, Justices.*]

LUNT and COOK *vs.* THE BANK OF NORTH AMERICA,
impleaded, &c.

49b 221
160a 301

Checks drawn in the ordinary general form, not describing any particular fund, or using any words of transfer of the whole or any part of the account standing to the credit of the drawer in the bank upon which they are drawn, but containing only the usual request directed to the bank, to pay to the order of the payee named, a certain sum of money, are of the same legal effect as inland bills of exchange; and do not amount to an assignment of the funds of the drawer, in the bank.

There is no liability of the party upon whom such an instrument is drawn, until after it is accepted; and until payment or acceptance, it is always revocable by the drawer.

A PPEAL from a judgment entered at a special term, on a trial before a justice of this court without a jury. Jacob G. Conrad, a broker, at Chicago, Illinois, made a general assignment to the plaintiffs, in trust for the benefit of creditors, September 30th, 1864. Conrad had, at the time, on deposit with the Importers and Traders' Bank, in New York, \$37,432.75, and \$1500 with the defendants, Myers & Co. The balance in the Importers and Traders' Bank, at the trial, amounted to \$39,943.61. Notice of the assignment was immediately given by the plaintiffs, by telegram and letter. Thereafter, in October, 1864, certain creditors of Conrad attached these moneys, and the plaintiffs, as such assignees, brought this action against the holders of the funds, the attaching creditors, and the sheriff, to set aside the asserted liens of the attachments, and to recover the funds. Conrad, in the course of his business, drew checks, at Chicago, upon the Importers and Traders' Bank of New York, and negotiated them in the course of business. He "sold exchange" on New York. The court allowed the defendants, the Bank of North America, to prove the possession by that bank of two checks; one for \$20,000, the other for \$25,000, transferred to it by the Second National Bank of Chicago. The checks, with the indorsements thereon, are as follows:

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“J. G. Conrad, Banker,

Chicago, Sept. 26, 1864.

No. 14,784. Duplicate unpaid. \$20,000.

Pay to the order of E. J. Tinkham, Cas., Twenty
Thousand Dollars. { U. S. Rev. Stamp
canceled, 2 cts. }

To the Importers and Traders' Bank, New York.

J. G. CONRAD.

Indorsed. Pay Bank of North America, or order.

EDW. TINKHAM, Cash.”

“J. G. Conrad, Banker,

Chicago, Sept. 27, 1864.

No. 15,825. Duplicate unpaid. \$25,000.

Pay to the order of E. J. Tinkham, C. Twenty-Five
Thousand Dollars. { U. S. Rev. Stamp
canceled, 2 cts. }

To the Importers and Traders' Bank, New York.

J. G. CONRAD.

Indorsed. Pay Bank of North America, or order.

E. J. TINKHAM, Cash.”

The court held that these latter checks, negotiated at Chicago, prior to the assignment to the plaintiffs, constituted an equitable assignment of the fund in the Importers and Traders' Bank of New York; and therefore ordered judgment in favor of the Bank of North America, for the whole fund. The court further ordered judgment against the plaintiffs in favor of the Bank of North America, for their costs.

The court held, that the assignment to the plaintiffs was legal and valid, and the plaintiffs entitled to recover under it the \$1500 in the hands of Myers & Company; but this valid assignment was held ineffectual to transfer the fund in the Importers and Traders' Bank.

The plaintiffs appealed.

E. L. Fancher, for the appellants. I. There is no difference between a banker's check and a bill of exchange; the

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same rules apply to both. (*Harker v. Anderson*, 21 *Wend.* 372, and cases cited. *Bowen v. Newell*, 8 *N. Y. Rep.* 190.)

II. A check on a bank, unaccepted, is merely an order upon the bank, on which the bank is not liable until it is accepted. (*Schneider v. Irving Bank*, 1 *Daly*; 500.)

III. An unaccepted check on a bank does not, at law or in equity, work an assignment of the fund in the bank, or create any lien upon it. (*Dykers v. Leather Manufacturers' Bank*, 11 *Paige*, 612. *Harris v. Clark*, 3 *Comst.* 93. *Cowperthwaite v. Sheffield*, 3 *N. Y. Rep.* 243. *Winter v. Drury*, 5 *N. Y. Rep.* 525. *Chapman v. White*, 6 *id.* 412.)

IV. The drawer of a check owes no duty to the holder until the check is presented and accepted. (*Chapman v. White*, 6 *N. Y. Rep.* 417.)

V. The doctrine that a check is an appropriation of so much money in the hands of a banker to the holder of the check, has been repudiated by repeated decisions in this state. (*See cases cited on third point.*)

VI. The checks held by the Bank of North America were drawn on a bank in New York, and by their terms made payable here. Therefore the law of New York controls their interpretation and effect. (*Everett v. Vendryes*, 19 *N. Y. Rep.* 436. *Bowen v. Newell*, 13 *id.* 290. *Hyde v. Goodnow*, 3 *id.* 269. *Lee v. Silleck*, 33 *id.* 615.)

VII. The common law of England prevails in Illinois by virtue of a statute of that state, proved on the trial of this action. The decisions in Illinois, referred to by the respondents, cannot aid them, for two reasons: 1. The checks in question are not to have effect or be construed according to the law of Illinois; for, being payable in New York, the law of the latter state governs. 2. The Illinois decisions are erroneous; are plainly repugnant to the common law, and contrary to the decisions in New York, *supra*, and to those of the United States Supreme Court. (*Mandeville v. Welch*, 5 *Wheat.* 286. *Tieman v. Jackson*, 5 *Peters*, 580.) And

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those in England. (*Williams v. Everett*, 14 *East*, 582. *Grant v. Austin*, 3 *Price*, 58.)

VIII. The judgment of the special term should be reversed, with costs; the plaintiffs adjudged to be entitled to the \$39,943.61, and, forasmuch as the Bank of North America has taken the fund under the judgment herein, restitution to the plaintiffs should be ordered against that bank for said amount, with interest from the 15th February, 1866, with the costs of this action paid that bank, and with the plaintiffs' costs herein.

S. P. Nash, for the Bank of North America. I. The court, at special term, held that the check for \$20,000, dated September 26th, 1864, which was presented to the Importers and Traders' Bank on the 30th September, 1864, was an equitable assignment to that amount, to the Bank of North America, of the fund of \$39,943.61 remaining in the hands of the said Importers and Traders' Bank, and constituted the first equitable lien thereon, *as against all other parties to this action*; and that the said check for \$25,000, dated September 27th, 1864, constituted a like equitable assignment of the residue, and was the second equitable lien thereon, *as against all the other parties to this action*. As no party has excepted to or appealed from this decision except the plaintiffs, assignees of *Conrad*, the only question is whether they have a better right to it.

1. As a general rule, a voluntary general assignee of an insolvent debtor takes the assigned estate subject to all charges and equities thereon. (*Van Heusen v. Radcliff*, 17 *N. Y. Rep.* 580. *Haggerty v. Palmer*, 6 *John. Ch.* 437.) The assignment is to be construed as though the estate was conveyed expressly subject to all prior dispositions made of it by the assignee. In this case, there is no evidence that *Conrad* intended to revoke the payment of the checks. In due course of mail, they would reach his bank in time to be paid before he made his assignment, and they were in fact

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presented before it was executed. He supposed that they would be paid, and the description in the assignment of the property he intended to convey as property "now belonging to the party of the first part," implies that it was such property as he had retained, not such as he had drawn against and appropriated, that he was assigning. As against *Conrad's* assignees, therefore, there seems to be no difficulty in holding that the owners of these checks had the prior right.

2. Though there are *dicta* to the effect that a check, unless accepted; does not operate as an equitable assignment, none of the cases in our courts are in reality adverse to the decision of the special term. In *Harris v. Clark*, (3 Comst. 93,) the question was whether an unaccepted bill of exchange delivered by the drawer during his last illness, was a good *donatio mortis causa*. The distinction drawn by Ruggles, J. in the prevailing opinion, between a check and a bill of exchange (pp. 119, 121) goes far to sustain the decision in this case. (See *Lawson v. Lawson*, (1 P. Williams, 141,) commented on in 3 Comst. 118, 119, and in *Craig v. Craig*, (3 Barb. Ch. 117, 118.) *Cowperthwaite v. Sheffield*, 3 Comst. 243,) was also a case of bills of exchange, not of checks. In *Dykens v. Leather Man. Bank*, (11 Paige, 612,) the complainants claimed to make the bank liable for having paid out the drawer's funds on other checks. The court held that the complainant had shown no priority for their check, as having been first drawn or presented, over the checks of other holders, who were equally entitled, and dismissed the suit. In *Chapman v. White*, (2 Seld. 412,) the funds of the bank on which the check was drawn had passed into the hands of a receiver before the check was indorsed and presented. None of these cases present the question as arising between the holder and the drawer's assignee. *Winter v. Drury*, (1 Seld. 525,) is nearest like the case at bar. There, however, the assignor had received the funds from the depositary and paid them out in good faith without notice of the draft, and it was

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held he was not liable. There is, then, no case in our courts which holds that a general assignee may compel a bank, to which a check drawn by the assignee has been presented for payment prior to the assignment, to withhold payment and deliver the fund to the assignee.

3. On principle, there is no difficulty in sustaining the rights of the Bank of North America as against the assignees. The transaction was, in fact, a sale by *Conrad* of his funds in the Importers and Traders' Bank for a valuable consideration paid at the time. Assume that it was in form imperfect to carry out the intent, yet equity, on well settled principles, would help out the defect. (2 *Story's Eq.* § 1041, 1047. *Harris v. Clark*, 3 *Comst.* 93, 109.)

4. *Conrad* had received, on the 26th and 27th September, \$45,000 as a consideration for appropriating an equal amount in his bank in New York to the use of the purchaser of his checks; to allow him, or his voluntary assignee, to revoke that appropriation, *without returning the money received*, would be to lend the aid of the court to a gross fraud. It is the plaintiff's assignees, who doubtless received, under the assignment of the 30th September, a large portion of the money received by *Conrad* on the 26th and 27th, who are now asking the aid of the court. They must come with clean hands to be entitled to relief.

5. The doctrine of equitable assignment assumes that there is no remedy at law. The court of equity to prevent fraud, to protect purchasers in good faith, and to enforce justice between parties, lays hold of a fund appropriated in purpose and intention, but inadequately disposed of in law, and carries out the intent of the parties, where no rights or equities of other parties are violated. Here there are no rights superior to those of the check holder.

II. The law of Illinois was made part of the case. The question, as between the plaintiffs and the Bank of North America, should be governed by that law. The checks were drawn and negotiated, in Chicago, to the bank there to whose

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rights the Bank of North America has succeeded. The assignment was made in Chicago, and must be held to have passed only such property as according to the laws of Illinois, Conrad had not already charged. The fund in New York, being personal property, is to be deemed present in Illinois, the place of the owner's domicil, and there all the parties to the original transactions resided. (*Van Buskirk v. Warren*, 34 Barb. 457. *Moore v. Willett*, 35 id. 663. *Artisans' Bank v. Park Bank*, 41 id. 599.) There can be no question that by the law of Illinois, the purchaser of these checks became the equitable assignee of the fund against which they were drawn. (*Munn v. Burch*, 25 Ill. Rep. 35. *Chicago Mar. and Ins. Co. v. Sanford*, 28 id. 168. *Marine Bank v. Ogden*, 29 id. 248. *Springfield Mar. and Fire Ins. Co. v. Tucker*, 30 id. 399. 5 *Gilman*, 346. *Talcot v. Dudley*, 4 *Scammon*, 435. *Case cited in 34 Barb.* 457. *Tinkum v. Hayworth*, 31 Ill. R. 519. *Mar. Bank, Chicago v. Chandler*, 27 id. 546.)

III. The presentation to the Importers and Traders' Bank was full and complete. The checks had been presented through the clearing house before the execution of the assignment. They were presented by the holder himself before the bank had received notice of the assignment. There was no refusal to pay by the bank, but simply a hesitation growing out of the state of the accounts. What then took place was equivalent in equity to an acceptance of the checks to the extent of the funds available towards paying them, though undoubtedly, according to the law merchant, the bank was not bound to pay without funds enough to pay in full. By its answer the bank set up no rights in itself or others in opposition to the true claims of the check holders, but submitted the fund to the adjudication of the court. (*Kilsby v. Williams*, 5 B. & Ald. 815.)

By the Court, LEONARD, P. J. The Bank of North America are the holders of two checks drawn by Jacob G. Conrad of Chicago, banker, in favor of E. J. Tinkham,

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cashier of the Second National Bank of Chicago, upon the Importers and Traders' Bank of New York, together for the amount of \$45,000, and by the said cashier indorsed to the Bank of North America. The checks were drawn and dated respectively the 26th and 27th days of September, 1864. They were presented for payment during the forenoon of September 30, but it was refused, for the want of funds. There were also several other checks drawn by Conrad for value, at Chicago, upon the same bank, in New York, shortly after the said two checks, which were also presented for payment, and refused, at the same time with the said two checks.

The whole balance in bank, applicable to the payment of these checks, on the morning of September 30, 1864, was less than \$31,000, and the Importers and Traders Bank reduced that balance on the same day over \$25,000, by charging to Conrad certain uncollected demands not then due, in the possession of the bank for collection for the account of Conrad. These and other demands were subsequently collected by that bank, so that at the trial there was about \$40,000 in bank, arising from the funds and assets of Mr. Conrad.

On the 30th of September, 1864, Mr. Conrad executed a general assignment for the benefit of his creditors, to the plaintiffs in this action, Lunt & Cook, by virtue of which they claim to recover the funds and assets placed by Mr. Conrad in the said bank.

There are other facts relating to the rights of other defendants, but no appeal has been taken in their behalf, and we have no occasion to refer to them. The Bank of North America claim that the said checks now held by that bank, amount to an equitable assignment, not only of the sum standing to the credit of Mr. Conrad on the 30th of September, but also of the sums subsequently collected by the Importers' and Traders' Bank from demands received from him for collection, and this court at special term have rendered judgment according to the said claim of the Bank of North America, and against the claim of the plaintiffs.

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The checks held by the said Bank are drawn in the ordinary general form, not discribing any particular fund, or using any words of transfer of the whole or any part of the account standing to the credit of Mr. Conrad. They contain only the usual request, directed to the bank, to pay to the order of the payee named a certain sum of money.

Such checks have long been held, both by elementary writers, and judicial decisions in this state, to be of the same legal effect as inland bills of exchange. There is no liability of the party upon whom such an instrument is drawn until after it is accepted. Such check is always revocable by the drawer until payment or acceptance. How can it be said that these checks held by the Bank of North America are an assignment of the funds of the drawer, any more than the subsequent ones drawn before the execution of the assignment to the plaintiffs?

Neither have been preferred by the general assignment of Mr. Conrad. The payee took no special security upon the bank account of the drawer. He could have done so, had he not been satisfied with the credit or mercantile honor of the drawer, before parting with his money.

The two cases in 3d Comstock's Reports are entirely conclusive in the case before us. Judge Ruggles says, in the case of *Harris v. Clark*, (p. 115,) "The research of the counsel for the plaintiff has not enabled me to find a case where it has been held that upon a negotiable bill of exchange the drawee has been made liable in equity to the holder of the bill without his acceptance or assent. Such an instrument gives to the holder no lien upon the funds in the hands of the drawee." That case also holds that a draft payable out of a particular fund operates as an assignment *pro tanto* to the drawee; that an accepted bill of exchange operates in the same way, but that effect is not given to a bill not accepted. The learned judge also adds, "The principle appears to be firmly established that a bill of exchange does not of itself give to the holder, either at law or in

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equity, a lien upon the funds of the creditor in the hands of the debtor until after acceptance by the latter." The cases are carefully reviewed, and it is unnecessary here to repeat what has been there so well stated. I am unable to perceive any difference, in the application of these principles, between the case of an unaccepted bill of exchange and a banker's check. The reasoning is in force here, although in the case just referred to the action was assumpsit to recover upon a bill of exchange, delivered by the drawer to his sister without consideration, *donatio mortis causa*.

The case of *Cowperthwaite v. Sheffield*, (3 Comst. 243,) was an action of assumpsit to recover the amount of a bill of exchange drawn against a shipment of cotton, which was refused acceptance. The Court of Appeals, notwithstanding very strong equities in favor of the plaintiffs, decided against the claim that the bill should be held to be an equitable transfer or appropriation of the proceeds of the cotton.

There is no evidence or finding to warrant the presumption that the plaintiffs relied upon anything but the credit of the drawer and indorser of this check. There was no verbal arrangement even, that the check was to operate as an assignment of the fund or property in the bank upon which it was drawn.

In the case last referred to, it was said, (*p.* 252,) that such a claim "could only be in favor of a party who had notice of the arrangement, between the drawer and drawee to appropriate the fund, and who had purchased the bills or became liable upon them, upon the faith of it." In that case there was a letter of advice that the bills had been drawn against the shipment of cotton, which, no doubt, induced the Bank of England to discount the bills. But this was held not sufficient to create an equitable appropriation. No such fact exists in this case. Were this court to sustain the judgment, it would confer a new capacity upon mercantile or banker's checks not before supposed to exist.

The judgment should be reversed, and the Bank of North

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America be adjudged to return the money with interest, and that the plaintiffs recover the amount of the fund with costs of the action and of the appeal, from the said bank.

[NEW YORK GENERAL TERM, June 8, 1867, *Leonard, Clarke, and Wallis*, Justices.]

CHARLES KELSEY vs. ROBERT MURRAY, United States marshal, &c.

In an action by the plaintiff, the owner of a wharf or dock at the foot of Sedgwick street, Brooklyn, to recover a sum claimed to be due from the defendant, for wharfage, the defendant attempted to show the wharf or pier to be within the county of New York, inferentially, from the following statutes and facts, viz: The county of Kings is bounded northerly by the county of New York; the county of New York contains all the land under water to low water mark, on Long Island; the statute, (*Laws of 1836, ch. 484, § 2*), makes the bulkhead line to be located in pursuance of its provisions, the permanent water line of the city of Brooklyn, and prohibits the extension of any bulkhead into the East river beyond such line. In 1857, the legislature established a bulkhead line, or line of solid filling, and prohibited the filling in with solid material in the waters of the port beyond such bulkhead line. The evidence did not show where the line of low water mark was, or the bulkhead line established by law. There was a bulkhead at the foot of Sedgwick street, and the wharf or pier in question extended 450 feet into the water beyond; but it was not shown that such bulkhead extended to the line established by law. *Held*, that it could not be assumed that the law prohibiting the erection of a wharf or pier of solid material in the water outside of a certain line had been violated. That there was no necessary sequence, from the statutes referred to, or the evidence in the case, that the premises were not in the city of Brooklyn.

Held, also, that the lessees of the plaintiff having been dispossessed of the premises, under summary proceedings instituted by the plaintiff, before the city judge of Brooklyn, for non-payment of rent, and the judgment of dispossession having been affirmed by the Supreme Court, on *certiorari*, such judgment and affirmance were a conclusive bar to any claim to the wharfage by the lessees of the plaintiff.

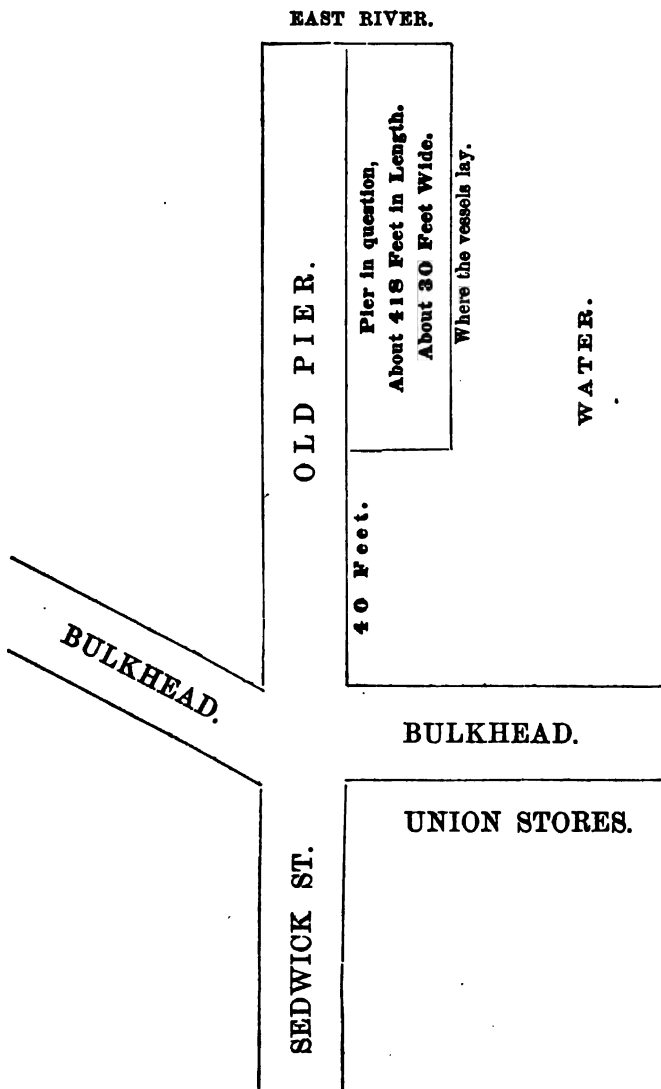
A PPEAL, by the defendant, from a judgment entered upon the report of a referee.

The plaintiff, the owner of a certain addition to a pier

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or wharf at the foot of Sedgwick street, Brooklyn,(a)
commenced an action against Robert Murray, marshal of

(a) Diagram of premises in question.



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the southern district of New York, to recover the sum of \$5166.64, the amount of certain wharfages, which the plaintiff claimed as being due to him for divers prize vessels placed by the said marshal at the said addition, and by him left there, moored for certain periods, during which certain proceedings were had in the United States District Court on the prize side of that court, under which the said vessels were sold, and the proceeds paid into court. The plaintiff presented bills for said wharfages to the marshal, who taxed them as part of his costs in those proceedings, collected, received and held them at the commencement of this suit in the court below, to the use of the plaintiff. The marshal interposed in substance two defenses, viz: 1st. That the wharf in question was held by Ward & Gove, under a lease from the plaintiff for ten years from September 27, 1858, by virtue of which lease he insisted that the said Ward & Gove were entitled to these wharfages. 2d. That as such marshal, he admits he received \$3386, of these wharfages for certain vessels, (naming them,) which he stands ready and always willing to pay into court, or to the persons entitled thereto, and he prays the judgment of the court in the premises, as to who is entitled to the same; and that he may be permitted to pay the same into court and be discharged from all liability therefor. 3d. He admits, further, having received \$245.21, for wharfages of certain vessels, naming them, which he has paid over to Ward & Gove, before notice of the plaintiff's claim.

This cause was referred to the Hon. John T. Hoffman, as sole referee, who, after hearing the cause, rendered his report in favor of the plaintiff, for the money which the marshal admitted he had received from the proceeds of the different vessels, and which he stood ready to pay over, viz. \$3386 and interest on that amount, also for the moneys which the marshal admitted he had received, but had paid over to Ward & Gove without notice of the plaintiff's claim.

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On this question of notice the referee found against the marshal, *in all, with interest*, \$3885.41.

From the judgment entered on this report, the marshal appealed to the general term.

B. F. Tracy, for the appellant. I. The navigable rivers are public highways, and no person can impose a burden on those navigating such rivers except by a license from the sovereign power. Any person may use a wharf or a pier, and those who would impose a burden for such use must show their *right*. 1. There is a license implied by law to all persons navigating public waters to occupy wharves and piers. (*Heany v. Heeney*, 2 *Denio*, 625. *Taylor et al. v. The Atlantic Mut. Insur. Company*, 2 *Bosw.* 106.) 2. The right to take tolls being a charge upon the public and against common right, could not be granted even by the crown, except upon consideration of benefit to the public, as the erection of a wharf or keeping it in repair, &c. (*Sir F. Moor's R.* 474. 1 *Term. Rep.* 660.) A franchise, in this country, is a privilege or immunity of a public nature which cannot legally be exercised without legislative grant. (*The People v. Utica Insurance Company*, 15 *John.* 358.) The right to erect a wharf and to receive tolls for the use thereof is a *franchise*, and cannot be exercised by an individual citizen except under a grant for that purpose from the sovereign power. (*Wiswall v. Hall*, 3 *Paige*, 313.) The right to claim wharfage does not rest in contract. The owner or master is not a tenant of the owner of the pier. (*Nicoll v. Gardner*, 13 *Wend.* 288, 292.) The right to demand wharfage, and the amount to be demanded, are both fixed by law. (*Id.*) An agreement to pay wharfage to one not entitled to receive it, or an agreement to pay more than the legal amount, would be void for want of consideration. He who demands wharfage, therefore, must establish his right to receive it. It is not enough in an action for wharfage, therefore, to show that the party claiming wharfage is the owner or in possession of said wharf.

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He must go further and show that he owns the franchise—the right to demand and receive wharfage; in other words, he must show his right to construct a pier in the navigable river. It is always a good defense to show that the plaintiff is not entitled to demand and receive the wharfage for the use of the pier. In distress for wharfage, it must appear that the party distraining is entitled to collect the wharfage. (*Marshall v. Vultee*, 1 *E. D. Smith*, 294.)

II. The plaintiff was not entitled to collect wharfage for vessels lying in the waters fronting the premises leased to Ward & Gove. 1. The city judge of Brooklyn had no jurisdiction in the premises. The pretended possession of the addition derived from the sheriff was wholly void, and the plaintiff was a trespasser. 2. Even if it were legal, the possession of the addition would not authorize the plaintiff under the covenants in the first lease (September, 1858,) to collect wharfage for vessels lying in front of said premises. (a.) The city judge of the city of Brooklyn may exercise, *within the county of Kings*, all the powers * * * and perform all such duties and do all such acts as might have been done or performed under the laws in force on the 12th day of May, 1847, by the judges of the court of common pleas or by any one or more of them. (*Laws of 1849, ch. 125, § 26.*) (b.) The pier was not situate within Kings county. The county of Kings is bounded northerly by the county of New York. The county of New York contains * * * all the *land under water* within the following bounds: Beginning at Spuyten Duyvel creek * * * then to cross over to Nassau or Long Island at low water mark * * * then along Nassau or Long Island shore at low water mark to the south side of the Red Hook. (*Edmonds' Stat. at Large, vol. 5, App. p. 52.*) This pier stood north of the Red Hook in the East river at the foot of Sedgwick street in the city of Brooklyn. The second section of the act of May 25, 1836, (*Laws of 1836, ch. 484.*) by its terms makes the line of bulkhead, to be located in pursuance of its pro-

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visions, the permanent water line of the city of Brooklyn, and prohibited the extending of any bulkhead into the East river beyond such line. (*See also Laws of 1848, ch. 156, and 1850, ch. 313.*) The act of the 17th of April, 1857, establishes a bulkhead line or line of solid filling, and provides that "it shall not be lawful to fill in with earth, stone or other solid material, in the waters of said port beyond the bulkhead line or line of solid filling hereby established." The pier in question extended from the bulkhead line or line of solid filling out about 450 feet into the East river. The addition in question commenced 40 feet from the bulkhead in deep water and extended into the river 418 feet. It was, therefore, within the city and county of New York and without the jurisdiction of the city of Brooklyn. In *Udall v. The Trustees of Brooklyn*, (19 John. 175,) the Supreme Court decided that the county of Kings includes all the wharves and made land on the Long Island shore of the East river, as well as natural alluvia to the actual line of low water mark. The principle of this decision would, we concede, carry the line of Kings county to the line of solid filling or made land without reference to the line of ancient low water mark, and this bulkhead line or line of solid filling becomes the boundary line between Kings county and New York. But in *Stryker v. The Mayor, &c. of New York*, reported in the same volume, p. 179, the court held that a vessel fastened to the dock on the Brooklyn shore is within the county of New York. The court distinguish this from the case of *Udall v. The Trustees of Brooklyn*, (*supra*,) and say that the city and county of New York includes the whole of the rivers and harbor of New York to actual low water mark. The principle of these cases is to make the permanent bulkhead line, or line of solid filling, the boundary line between New York and Kings. This gives a uniform, permanent and well defined line. The pier in question stands in the water and outside the bulkhead line. The land on which it stands is clearly within the county of New York. It would seem

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absurd to hold that a superstructure erected on this land could be in a different county and subject to a different jurisdiction. The city judge of Brooklyn, therefore, had no jurisdiction to entertain the proceedings in this case, and his judgment therein is simply a nullity.

III. The jurisdiction of any court exercising authority over a subject may be inquired into in any court where the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings. (*Elliott v. Piersol*, 1 *Peters*, 328, 340. *The Chemung Canal Bank v. Judson*, 8 *N. Y. Rep.* 254, 259. *Adams v. The Saratoga R. R. Co.* 10 *id.* 328. *Simmons v. De Barre*, 8 *Abb. Pr.* 269.)

“When a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought (even prior to a reversal) in opposition to them. They constitute no justification, and persons concerned in executing such judgments or sentences are considered in law as trespassers.” (*Elliott v. Piersol*, *supra*.) This language is expressly approved in *The Chemung Canal Bank v. Judson*, (*supra*.)

To entitle the plaintiff to collect and receive wharfage for the use of a pier, he must have been lawfully possessed of the franchise which he claimed. Certainly a mere trespasser cannot demand wharfage. The plaintiff had no other claim to this franchise except such as he derived from the proceedings before the city judge.

If these proceedings are an absolute nullity, the plaintiff was a trespasser, and had no more right than any other trespasser to collect wharfage from vessels making fast to the pier.

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D. & T. McMahon, for the respondent. I. The defendant could not urge a nonsuit. In his answer he expressly admits his liability in the character in which he is sued, and his willingness to pay over \$3386, for the wharfage of certain vessels to whomsoever entitled, and prays the judgment of this court, that it may order him to pay that money into court, and be relieved from further inquiry about it; that he may be allowed his costs of defense; and he prays no other relief. This defense is the purely equitable one of an interpleader, not a denial of his personal liability to pay the wharfage in question. By section 150 of the Code, a defendant may set up an equitable defense or counter-claim. Where a defendant seeks to avail himself of a right to interplead, he submits himself to the direction of the court, and merely asks its direction as to which of the adverse claimants he shall pay the fund. The only decree he is entitled to, is the liberty to bring the fund into court and have his costs, leaving the defendants to settle the question of ownership between themselves. (*Bedell v. Hoffman*, 2 Paige, 200.) Where a party seeks to interplead, he must admit a title as against himself in all the defendants. (*Gwin v. Greene*, 1 Ire. Eq. 229. *Anderson v. Williams*, 10 S. & M. 60.)

II. The defendant was properly sued as United States marshal on an individual liability growing out of his position as marshal.

III. Robert Murray, by his action in this case as United States marshal, has rendered himself personally liable in his official character to the plaintiff.

IV. The amount reported in favor of the plaintiff by the referee, was correct.

V. On the motion for nonsuit, the defendant could not urge that there was a defect of parties, viz. Ward & Gove. No such defense is set up in sections 144, 147 and 148 of the Code. (*Zabriskie v. Smith*, 3 Kern. 322. *Mayhew v. Robinson*, 10 How. 162.) It is not even a ground of variance. (*Carter v. Hope*, 10 Barb. 180.)

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VI. The referee properly overruled the ground of nonsuit taken by the defense, that the claim of Ward & Gove, by virtue of the lease of 1858, to the dockage and wharfage in question, was valid. (a.) Ward & Gove, after accepting their lease of 1858, modified the rights acquired thereunder, by a new agreement with the plaintiff, in pursuance of which, it was agreed that the plaintiff should build the addition in question, and should let and rent the same to Ward, Gove & Morris, for \$1700 per annum. In pursuance of this lease, the plaintiff built the new pier or addition in question, and completed the same prior to 1861, and the tenants, Ward, Gove & Morris, occupied the same thereunder, until January 1, 1862. Soon after which day, they refusing to pay the rent, the plaintiff instituted summary proceedings, to turn the tenants, Ward, Gove & Morris, out for non-payment of rent. This matter was adjudicated before City Judge Reynolds and a jury, and a verdict rendered for the plaintiff, the landlord, under which adjudication the tenants on the 22d day of January, 1862, were dispossessed, and the plaintiff put in possession. This adjudication was finally affirmed in the Supreme Court at general term, on *certiorari* from these proceedings. This adjudication was conclusive on the right of the plaintiff to the wharfages in question, as against Ward & Gove, the lessees under the lease of 1858, which lease was introduced in the proceedings. All the wharfages claimed for, in this suit, and allowed by the referee, were for vessels stationed at that addition, on and after January 22, 1862. Notice of the decision was immediately given to the marshal. The marshal recognized the possession of the plaintiff, by taking bills from him for those wharfages made out as debtor to Mr. Kelsey, taxed them as part of his disbursements, collected the same and held them for the benefit of the party entitled. (b.) The right to wharfage attaches whenever the vessel uses or makes fast to any pier, wharf or bulkhead. (*See Laws of 1860, ch. 254, p. 416.*) This first section uses the words, "It shall be lawful to charge and receive wharfage, dockage, &c. The



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2d section provides that if the wharfage is not paid in twenty-four hours after demand, the owners of the wharf or pier shall be entitled to collect double the rates of wharfage. The words "owners of the wharf," in the 2d section, are used descriptively of the class of persons entitled to the wharfages, viz. those in the possession of the side of the pier, or of the bulkhead to which the vessel is attached. In this case the claim in suit is not to collect wharfage of the ship owners; that has already been done. It is to collect of the marshal, who has received it on bills rendered by the plaintiff for a compensation, for the use of that side of the pier, and in that character. Such being the case, there was not the slightest warrant for refusing the plaintiff his judgment. Unless the referee had held the marshal (having the money in his hands) responsible to the plaintiff, the latter would have been entirely without remedy. To whom was he to look? Certainly not to the government, who have paid those expenses. Has he a lien on the prize proceeds? He would have, were it not that they have already been distributed, and on such distribution the marshal has received these costs.

VII. The exceptions taken as to the admissibility of the record of proceeding, on the summary proceedings before Judge Reynolds, and on the *certiorari*, were properly overruled. There was material evidence that the plaintiff was owner and entitled to the wharfage in question.

VIII. The referee properly found that the plaintiff was entitled to judgment for the \$3386, and the \$245.24. (a.) The only real issue presented was as to the right of the plaintiff to these wharfages. The defendant admitted he had the money, and was ready to pay it to the one entitled. Ward & Gove had given him notice not to pay it to any one but themselves, and he desired the court to adjudge the proper person to pay it to. (b.) The plaintiff produced and proved before the referee an adjudication, finding and determining that the plaintiff was during all the times embraced in those bills, the owner of the addition in question. Such

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ownership carried with it the right to the wharfages in question. This adjudication was complete. (*White v. Coatsworth*, 6 N. Y. Rep. 137.) (c.) The marshal could not, by refusing to pay the same to the plaintiff, urge upon him a litigation respecting his rights and equities with Ward, Gove & Morris.

By the Court, LEONARD, J. The defendant, admitting that he has used the wharf, or dock, mentioned in the complaint, for the purpose of moving certain vessels in his custody as marshal, and that the money due for wharfage, or dockage, is in his hands, sets up a lease of the said wharf, or dock, from the plaintiff to Ward, Gove & Morris, during the time while the said wharfage accrued, and that the said firm have given him notice that they claim the wharfage in question.

For the purpose of barring such claim, the plaintiff gave evidence at the trial that the said lessees had been dispossessed of the premises, under summary proceedings, instituted by the plaintiff, before the city judge of Brooklyn, for the non-payment of rent; and that the judgment, dispossessing the said lessees, had been affirmed by the general term of the Supreme Court, in the second district, *on certiorari*. The defendant insists that the city judge had no jurisdiction over the summary proceedings instituted before him by the plaintiff, because, as he alleges, the wharf, or dock, in question, is not in Brooklyn, but in the county of New York.

The local character of the jurisdiction of the city judge is not disputed, but the geographical situation of the wharf is not so clear. There was no direct testimony at the trial, and no fact has been found by the referee in respect to it. All the proceedings and evidence before the city judge were returned to the certiorari, and although it appears that counsel for the lessees objected to the jurisdiction of the judge, on the ground aforesaid, there is no evidence showing that the wharf, or pier, in question, was not in the city of Brooklyn,

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and county of Kings, or within the line of low water mark, on Long Island shore.

The counsel for the defendant attempts to show the wharf, or pier, to be within the county of New York inferentially, from certain statutes and known facts, as follows, viz. The county of Kings is bounded northerly by the county of New York. The county of New York contains all the land under water to low water mark on Long Island shore. The pier is at the foot of Sedgwick street, in the city of Brooklyn.

Chapter 484, Laws of 1836, section 2, makes the bulkhead line, to be located in pursuance of its provisions, the permanent water line of the city of Brooklyn, and prohibits the extension of any bulkhead into the East river beyond such line. In 1857, the legislature established a bulkhead line, or line of solid filling, and prohibited the filling in with solid material in the waters of the port beyond the bulkhead line thereby established. The evidence does not show, however, where is the line of low water mark, or the bulkhead line established by law. There is a bulkhead at the foot of Sedgwick street, and this wharf, or pier, extends 450 feet into the water beyond, but it has not been shown that this bulkhead extends to the line established by law. It cannot be assumed that the law prohibiting the erection of a wharf, or pier, of solid material, in the water outside of a certain established line, has been violated. There is no necessary sequence, from the statutes referred to, or the evidence in the case, that the premises are not within the city of Brooklyn.

I observe also that the affidavit put in by the lessees to the proceedings before the city judge, upon which the issue joined therein was tried, raised no question respecting the location of the premises, and no evidence was offered addressed to that subject. There is no reference to the subject, in the opinion of the Supreme Court, upon the decision of the certiorari, reported in 14 *Abb. Pr. R.* 372, (*People ex rel. Ward v. Kelsey.*) Had such a question been properly raised, it would have called for discussion. The decision of the city judge

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was affirmed, and it does not appear that the lessees have ever sought to question its correctness any further. It was necessary that the lessees should raise the question of jurisdiction, by clear and distinct evidence, as well as by affidavit upon which the issue in the summary proceedings was tried, that the premises in question were beyond low water mark, or outside of the line of the bulkhead established by law. Otherwise the question is waived, for the presumption of law is not against the location of the wharf within the city of Brooklyn. The mere dispute, suggested by the points of counsel in the summary proceedings, does not raise the question of jurisdiction.

There is nothing, so far as I can perceive, to prevent the judgment in the summary proceedings, and the affirmance thereof upon certiorari, being held as a conclusive bar to any claim to the wharfage by the lessees of the plaintiff.

The plaintiff was in the quiet and undisputed possession of the wharf, or pier, at the time the wharfage in question accrued, and it does not appear that the lessees have brought any action against the marshal, or made any claim, except by a general notice, although considerable time elapsed before the trial, and also before the action was brought.

The defendant entirely fails to show that the money in his hands is due to any other person than the plaintiff, or that the lessees have any valid claim to it.

I think the judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, J. C. Smith and Ingraham, Justices.*]

STONE and others *vs.* BROWNING and others.

In an action to recover the value of goods sold and delivered by the plaintiffs to the defendants, one of the defenses was that the sale was by samples, represented and warranted fair and correct; that the goods being inferior to the samples, the defendants returned them, and the plaintiffs accepted and disposed of them, without notice to the defendants. The terms of the sale in respect to the warranty of quality were quite uncertain, from the contradictory character of the evidence; one of the defendants testifying that the plaintiffs guaranteed the goods, and the plaintiff asserting the contrary. *Held*, that while the jury might have been justified in finding that it was a sale by sample, there being no such decisive evidence to that effect as would authorize the judge to give it to them as a conceded fact, or as a deduction of law, he properly left it to them to determine what was the intention of the parties, in that respect.

Held, also, that the jury having found that the defendants had no legal right to return the goods and rescind the sale, the latter were bound to pay the plaintiffs their commissions upon the resale for their account.

The plaintiffs, in their correspondence, asserted an absolute sale, and notified the defendants that they would treat the goods returned to them, as upon consignment from the defendants, and apply the proceeds upon their (the plaintiffs') "*lien*" for the price. *Held* that the word "*lien*" was not used in the technical sense, but was equivalent to "claim or demand" for the price; and was not inconsistent with an absolute or unconditional delivery so as to let in a defense under the statute of frauds.

Held, further, that the defendants were entitled to have the damages assessed at the market rates prevailing when the goods were returned, or the breach occurred; but that if the damages would then have been much larger in amount, so that they in fact sustained no injury, by such delay, nor by a sale upon credit, they had no right to complain.

APPEAL from a judgment entered upon the verdict of a jury in favor of the plaintiffs, for \$15,791.88. The action was brought to recover damages for the non-performance of a contract for the sale of goods by the plaintiffs, as commission brokers, to the defendants, made on the 11th of March, 1863. The facts appear in the opinion of the court.

A. Prentice, for the appellants.

Wm. Tracy, for the respondents.

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By the Court, LEONARD, P. J. The action is to recover for 65 cases of blue kerseys which the plaintiffs, as factors, claim to have sold and delivered to the defendants on the 11th of March, 1863, at the price of \$1.20 per yard, to be paid for by the defendants at four months, for which price they were to deliver their notes to the plaintiffs. The plaintiffs also allege that they demanded the notes; that the defendants refused to deliver them, and returned the kerseys to the plaintiffs, which they refused to receive except as the goods of the defendants, and upon the plaintiffs' lien for the price, and which they subsequently, upon notice to the defendants, sold for their account, applying the proceeds towards the payment, and claiming to recover the balance of the contract price, amounting to \$14,491.77, with interest.

The defendants, by their answer, allege several defenses, viz: That the sale was by samples, represented and warranted fair and correct; that the goods were very inferior in quality to the samples; that they returned them, and the plaintiffs accepted and disposed of them, without notice to the defendants. Also that the goods were purchased for soldiers' wear in the army, and the plaintiffs warranted that they were such as would pass inspection by the government officers; that on examination they were unlike the samples, and from their inferior quality, such as the government would not accept; and that the defendants returned them. Also that the sale was void under the statute of frauds.

The terms of the sale, in respect to the warranty of quality, were quite uncertain, from the contradictory character of the evidence. One of the defendants testified that the plaintiffs guarantied the goods, and the plaintiffs as positively asserted the contrary. It is not certain from the evidence that the sale was by sample, but it was probably so understood. Four cases were open; some pieces were taken from two or three of the cases, and one of the defendants looked at them; said they were coarse and unsightly. One of the plaintiffs said they were strong and serviceable. The defendants were in-

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vited to examine the whole. Were urged to do so without delay, so that they would understand what they were doing ; were told that another party who knew all about the goods was ready to purchase, and the importance of immediate and decisive action in respect to the purchase was insisted on. One of the plaintiffs said, in answer to an inquiry by another of the plaintiffs in the presence of the defendant Button, that looking at one case was as good as looking at the whole. In reply to an inquiry by counsel for the defendants, "whether Mr. Button bought these goods relying upon it that the others corresponded with those shown to him," one of the plaintiffs stated as follows : "My intention was to let Mr. Button see the lot ; Mr. Button must have understood that the goods would run like the sample ; it was my intention, and it was his intention."

The counsel for the defendants, upon this evidence, requested the judge to instruct the jury that it was a sale by sample. The judge declined, leaving it to the jury to determine what was the intention of the parties in this respect.

While the jury might have been justified in finding the fact to be as claimed by the defendants, there was no such decisive evidence that the sale was by sample, as would authorize the judge to give it to them as a conceded fact, or as a deduction of law. Much of this evidence produces the impression that the plaintiffs intended to make an absolute sale, so as to conclude any right of rescission, leaving nothing open between the parties except a customary allowance for holes or short measure. On the other hand, the admission by the plaintiffs that Mr. Button must have understood that the goods would run like the sample ; the statement that looking at one case was as good as looking at forty, followed by the interrogation on the part of the defendants, "Then he said these cases did fairly represent the balance of the goods ?" immediately answered, "yes sir," tends to produce the conviction that there was a warranty of the quality, or a sale by sample, and in the absence of other evidence, to be taken in

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the same connection, would be decisive. The positive evidence on the part of the plaintiffs, that they did not guaranty the goods to be as good as the cases that were shown; and the advice to Mr. Button to understand well what he was doing; that there were others wanting the goods, and the plaintiffs wished it a certain sale; to examine as much as they pleased; that the plaintiffs wanted no "afterclaps;" that they wanted a definite answer, and wanted the notes on the following Wednesday, must be taken in connection with the other testimony before adverted to, and leaves the question of warranty or sale by sample, an open one for the decision of the jury, in the manner that the judge put it to them.

The preponderance of testimony was very decided that the sixty-five cases were equal to the four which were exhibited. When they were returned, no objection was made, except that they were *specky*, a defect not affecting the strength or serviceable quality, as it appeared. These cases were all delivered between the 16th and 20th of March, 1863, both dates inclusive—a delay of a few days being given, as to the time of delivery and examination at the defendants' request. On the third of April, the defendants wrote to the plaintiffs that they declined to keep them, requesting the plaintiffs to send for them. The plaintiffs replied, the same day, that the goods were fairly exhibited, and equal to the four sample cases shown, claiming to consider the sale binding, and requesting the defendants to send their notes for the amount. On the 8th of April, the defendants again wrote insisting that the 32,000 yards of kerseys must be removed from their store; that they were uninsured, and subject to the plaintiffs' order. The plaintiffs replied, the same day, refusing to cancel the sale, claiming that it was fair and valid, and that the defendants would be held responsible. The sixty-five cases were returned on that day, except three, returned the previous day. The plaintiffs wrote the defendants the next day acknowledging the receipt of the goods, informing them that they considered the goods as consigned by the defendants, and unless they

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sent their notes within three days, that the plaintiffs would sell the goods for the account of the defendants, and, in behalf of the manufacturers, demand the difference between the amount they would net, and the amount of the sale to them. It appeared that the goods had fallen very rapidly, so that in April the price was as low as seventy cents per yard, and during the summer there was no demand, but in the fall the demand improved, and in November the plaintiffs sold them for 85 cents per yard, at six days' credit, and the action is to recover the difference between this price, and that agreed on between the parties. The defendants were at once informed of the sales by letter, and when the sale was closed an account was rendered showing the deficiency for which the plaintiffs have here recovered.

There were also 8000 yards of similar kerseys, made by a different manufacturer, sold by the plaintiffs to the defendants, on the same day with the 65 cases, but they proved to be tender, injured probably in the manufacture, not of the quality designed to be sold or purchased, and they were returned by the defendants, and accepted by the plaintiffs. The defendants insist that these were sold with the 65 cases, and that their defective quality attaches to and vitiates the sale also of the said cases. The evidence, I think, shows an entirely separate transaction, and that the validity of the sale of the 65 cases is not thereby affected. The correspondence, as well as the details of the evidence, exhibit a separate dealing for the 65 cases, sometimes also referred to as "32,000 yards light blue kerseys."

No evidence was offered by the defendants to show that the market was any more favorable for them at any time between the day the goods were returned and the day on which the plaintiffs sold them. From the evidence, it is easy to perceive that the defendants sustained no injury, but were benefitted, if they are to be held liable as upon a valid sale, by the delay in selling, and also by the sale upon credit. The defendants were, no doubt, entitled to have had their damages assessed

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at the market rates prevailing when the goods were returned, or the breach occurred, but the damages would have then been much larger in amount, and I do not see that they can complain of the benefit which occurred by the delay.

It was said, at the argument, that the claim of lien for the price, which the plaintiffs mentioned in their letter replying to that of the defendants accompanying the return of the kerseys, was inconsistent with an absolute or unconditional delivery, and let in a defense under the statute of frauds. It must be observed, that the plaintiffs in this correspondence assert an absolute sale, and notify the defendants that they will treat the goods as upon consignment from them, and apply the proceeds upon their lien for the price. The word was not used in the technical sense. It was an expression equivalent to "*claim or demand*," for the price. The jury must have found, under the charge of the judge, either that there was no warranty or sale by sample, or that, being a warranty or sale by sample, the kerseys were equal to the samples or the warranty. The jury having found against the claim of the defendants of a right to rescind or disaffirm the sale, and that the sale was valid and absolute, and the evidence requiring, as has been shown, that these questions should not be taken from the jury, the defense of the statute of frauds also fails.

The defendants also object to the commissions charged by the plaintiffs upon the resale for their account. The evidence shows that the charges are customary upon sales by commission dealers. The defendants must bear the necessary expenses of the resale, if, as the jury have found, there was no legal right to return the kerseys and rescind the sale.

The defendants also excepted to the admission of evidence that the market price of the kerseys had fallen off very largely at the time they returned them, and that the goods were of the same quality and description as others which had been sold to Amos Clark, and had passed the army inspection.

The evidence as to the falling off of the market tended to

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prove damages resulting from the defendants' course in returning the goods, and the quality of the goods sold to Clark, was proper to show that a representation made by the plaintiffs, at the time of the sale, to the defendants, that similar goods had been sold to Clark for the use of the army, and had been approved by the government inspector, was not untrue, and also to meet the averments of the answer. Evidence was admitted showing that an allowance had been made by the manufacturer in marking the measure upon the goods, for the holes and tender places in the kerseys. This evidence tended to show that the defendants could have no reasonable ground of complaint, and that the pretense set up in the answer, of an unfair arrangement of the order of delivery of the cases to the defendants, was unfounded.

There is not, so far as I am able to perceive, any well founded exception in the case, and, in respect to the order denying the motion for for a new trial, there appears to be no injustice done by the verdict.

The judgment, and the order denying a new trial, should be affirmed, with costs.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clerks and Welles, Justices.*]

MULLIN vs. HICKS and another.

Within the contemplation of the act of April 2, 1862, providing for the collection of demands against ships and vessels, and other similar statutes, the place where the services are in fact rendered, although they are rendered under and in pursuance of a contract made at another place, is the place where the debt is deemed to have been contracted.

Thus, where a contract was entered into at the city of New York, between the plaintiff and the master of a ship, by which the former agreed to load said ship, with oak timber, for a specified sum; and the ship—then lying at Brooklyn—was afterwards moved to Weehawken, in the state of New Jersey, where she was loaded by the plaintiff, under and in pursuance of the contract; *Held* that the sum due to the plaintiff for his services in loading the

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ship was not a debt contracted within the state of New York, nor a subsisting lien upon the vessel, for which an attachment could be issued under the act above mentioned.

A PPEAL from a judgment entered on the report of a referee.

William W. Goodrich, for the appellant.

Robert W. Andrews, for the respondent.

By the Court, WELLES, J. The action was brought upon a bond executed by the defendants to the plaintiff in the penalty of \$1800, dated May 28, 1864. The condition of the bond, after reciting that the ship "Julia," her tackle, apparel and furniture had been attached under and in pursuance of an act providing for the collection of demands against ships and vessels, to satisfy an alleged claim of the obligee against said vessel for the sum of \$871.65, provided that if the obligors should pay the amount of any and all claims and demands which should be established to be due the obligee, and to have been a subsisting lien upon said vessel pursuant to the provisions of the act entitled "An act for providing for the collection of demands against ships and vessels," passed April 2, 1862, then the said obligation to be void; otherwise to remain in force, &c. The first section of the act referred to in the condition of the bond provides that whenever a debt amounting to \$50 or upwards as to a sea going or ocean bound vessel, or amounting to \$15 or upwards as to any other vessel, shall be contracted by the master, owner, charterer, builder or consignee of any ship or vessel, or the agent of either of them, within this state, for either of the following purposes, &c. The section then proceeds to enumerate five particulars or descriptions of indebtedness for which a lien upon the vessel is or may be created; the fourth of which is as follows: "On account of loading or unloading, or for advances made for the purpose of pro-

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curing necessities for such ship or vessel, or for the insurance thereof." Such debt shall be a lien upon such vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon except mariner's wages.

On the first day of April, 1864, a written contract was entered into between the plaintiff and John R. Crosby, the master of the ship "Julia," by which the former agreed to load said ship with oak timber, &c. for the sum of \$1.90 per load of fifty cubic feet, the master agreeing to pay that sum. This contract bore date and was actually made and entered into in the city of New York, the vessel lying at the time at Brooklyn. She was afterwards moved to Weehawken in the state of New Jersey, and fastened to a dock there, where she remained during the whole time the plaintiff was loading her.

On the 27th day of May, 1864, and after the plaintiff had completed the loading of the vessel, he procured an attachment from a justice of this court in pursuance of the provisions of the above mentioned act, upon which the vessel was seized, and from which she was released, and the attachment discharged upon the execution and delivery of the bond upon which the present action was brought.

The report of the referee states, among other things, "That under agreements for that purpose, made in the city of New York, the plaintiff loaded the ship "Julia" with a cargo, consisting of oak and pine lumber and staves, and that there is due to him for such labor and services a balance of \$871.00 over and above all payments and just deductions," also, "that the ship was a sea going and ocean bound vessel, and the agreements to load were duly made by and with her master." Also, "that during the time the plaintiff was so loading the vessel, she lay attached to a pier or wharf at or near Weehawken on the New Jersey shore, opposite the city of New York." And he found, as a conclusion of law, that the debt for which the attachment was issued, was not contracted within the state of New York; that it was not a

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subsisting lien upon the vessel at the time the attachment was issued ; that the defendants were entitled to judgment ; and that the complaint be dismissed with costs. Judgment having been entered upon the report of the referee, in favor of the defendants, the plaintiff brought the present appeal.

The question to be decided is whether the plaintiff had a lien upon the ship for the debt due him for his services as stevedore, in loading her. And this depends upon the question where the debt was contracted. One of the provisions in the condition of the bond, was that the plaintiff had a subsisting lien for his demand at the time the attachment was issued ; and by the express provision of the statute referred to, the debt must have been contracted in the state of New York, in order to create such lien. The agreement under which the plaintiff's services in loading the vessel was performed, was made in the state of New York. There was no debt in existence however, until the plaintiff had performed his part of the agreement ; when that was done a debt came into existence. Where was that debt contracted ? Upon general principles it seems to me it was where the express agreement was made under which the services were rendered. That agreement was the only one made by and with the plaintiff in reference to loading the vessel. If no such express agreement had been made, the law would imply one on the part of the master of the vessel, and probably on the part of her owners, upon the full performance by the plaintiff of his services, to pay therefor what they were reasonably worth. In such a case the debt would properly be regarded as having been contracted at the place where the services were completed, which in the present case would be in the state of New Jersey, and not in the state of New York.

It is a sound principle, I believe, that where there is an express agreement, none is to be implied in relation to the subject matter of the express one. Here, therefore, there was no agreement or contract for the plaintiff's services, or the payment therefor, except the express one which was

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made in New York. It is true, as before stated, that there was no debt due to the plaintiff until the services in loading the ship were fully performed ; but when the debt came into existence upon the performance of the services, it rested for its validity upon the contract made in New York. It was there contracted for, in anticipation, and the contract made in New York, was the only one in the case. But on this subject the current of authority which I believe is unbroken, in regard to the place where the indebtedness is deemed to have been contracted, has settled the question adversely to the views just expressed, and holds that within the contemplation of the statute referred to, and of other similar statutes, the place where the services are in fact rendered, although rendered under and in pursuance of a contract made at another place, is the place where the debt is deemed to have been contracted. (*Crawford v. Collins*, 45 Barb. 269. *The Alida*, 1 Abb. Adm. 173. *Veltman v. Thompson*, 3 Comst. 438. *Garrison v. Howe*, 17 N. Y. Rep. 458, 465. *Phillips v. Wright*, 5 Sandf. 342, 362. *Hiscox v. Harbeck*, 2 Bosw. 506.) I bow respectfully to this array of authorities ; and if my brethren concur with me, the judgment must be affirmed with costs.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clarke and Welles*, Justices.]

KEENEY vs. MASON.

In February, 1864, the plaintiff and defendant entered into a written agreement, by which the former agreed to deliver, at a railroad station, a quantity of lumber, and the latter agreed to pay a specified price for such lumber, on delivery. In pursuance of this agreement, the plaintiff transported and deposited at the place of delivery a quantity of lumber, but it was not measured or inspected, and the defendant was not there to receive it and to make payment. On the 6th of September, the parties met and examined the lumber, when the plaintiff, by reason of the defendant's delay in receiving and

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paying for the lumber, refused to deliver it, upon the contract. The parties then entered into another contract for the sale of the lumber, whereby the defendant agreed to pay, and the plaintiff agreed to receive, an enhanced price for such lumber, and for the purchase and sale of other lumber.

Held that the new contract was not a parol alteration of the former written contract, but it was in substance and effect a new contract in lieu of the former one which the plaintiff refused to perform; and that it was valid, and would support an action.

Held, also, that such new contract having been *executed*, by the delivery of lumber upon it, and the payment of money, by the defendant, and a promise to pay the balance, it was too late for him to recede from it, or to object to its validity.

APPPEAL from a judgment entered upon the report of a referee. The action was brought to recover a balance due for the value of lumber sold by the plaintiff to the defendant; and also a small demand for services rendered by one D. L. Aiken for the defendant, assigned to the plaintiff. The complaint alleges a general indebtedness. The answer contains a general denial and a counter-claim. The defendant claims that the lumber in question was delivered pursuant to a written contract under seal, and that he has paid the full value of the same, at the prices fixed by the contract, while the plaintiff insists that the written contract was modified by an increase of price amounting to two dollars per thousand feet, and that at the enhanced prices there is a balance due him.

The referee found the following facts:

1st. That on the 24th day of February, 1864, the plaintiff and defendant entered into an agreement, under their respective hands and seals, whereby the plaintiff agreed to deliver on the railroad, at Tioga station, one hundred thousand feet of white pine and Norway lumber, and fifty to one hundred thousand feet of ash, as soon after spring sawing as said lumber was sufficiently seasoned to draw, and that said defendant agreed to pay, upon the delivery of said lumber at the railroad, \$15 per thousand for the white pine and Norway, and \$18 per thousand for all the ash.

2d. That in pursuance of the said agreement, the plaintiff

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delivered at the said Tioga station, during the months of May, June and July, 1864, 98,994 feet of Norway and white pine lumber, and 44,483 feet of ash. And that all of such lumber was so delivered some six or seven weeks prior to the 6th day of September, 1864, but had not yet been inspected or measured; nor had said defendant paid in full for the same.

3d. That on the 6th day of September, 1864, the defendant not having paid for said lumber as provided in said contract, and the same not then having been measured or inspected, or the quantity thereof ascertained, the said plaintiff and defendant made and entered into another contract for the sale of said lumber, whereby the defendant agreed to pay, and said plaintiff to receive, \$17 per thousand for the white pine and Norway, and \$20 per thousand for the ash.

4th. That on the said 6th day of September the said defendant bought of the plaintiff, and the plaintiff sold to the defendant, a quantity of cherry, oak and basswood lumber, at the agreed price of \$30 per thousand for the cherry, \$24 per thousand for the oak, and \$17 per thousand for the basswood.

5th. That afterwards, the said white pine, Norway, cherry, oak, and basswood lumber was inspected, measured, and delivered to said defendant, and that the quantity of the respective kinds, and the prices thereof, was as particularly specified in said report: The whole price amounting to \$2791.96.

6th. That on the 13th day of September, 1864, the said defendant was indebted to David S. Atkin in the sum of \$22.50 for the services of said Atkin, rendered to said defendant at his request for measuring and inspecting a quantity of lumber, and that on or about the 16th day of June, 1865, the said Atkin sold and assigned said claim to the plaintiff, and that thereupon the plaintiff became and is entitled to recover said sum from the defendant.

7th. That the defendant has paid on account of the price

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of said lumber \$2600. On March 8, 1864, \$400; on May 1, 1864, \$400; on September 6, 1864, \$1000; and on October 4, 1864, \$800; and there was due to said plaintiff from said defendant on October 4, 1864, the sum or balance of \$214.26, with interest from that date, over and above all payments made thereon.

8th. That after allowing to the defendant interest on the payments of \$400, made prior to September 6, 1864, and charging him with interest on the balance remaining unpaid on the 4th day of October, from that date there was due from the defendant to the plaintiff, at the date of the report, the sum of \$212.14.

And the referee found as a conclusion of law, that the defendant owed to the plaintiff the said sum of \$212.14 at the date of the report, for which sum the plaintiff was entitled to judgment against said defendant, with costs.

The defendant appealed.

Geo. T. Spencer, for the appellant.

Bradley & Kendall, for the respondent.

By the Court, E. DARWIN SMITH, J. The referee, I think, disposed of this case correctly. The property in the lumber, notwithstanding its delivery at the Tioga railroad station, remained the property of the plaintiff. It was not delivered to the defendant, on or before the 6th of September. It was simply transported to, and deposited at the place of delivery; but it was not measured or inspected, and the defendant was not there to receive it and to make payment, and the title to the property was not to vest until payment. By the terms of the contract of the 24th of February, the defendant was to pay for the lumber upon delivery. When, therefore, the parties met and examined the lumber, on the 6th of September, six or seven weeks after the property had been so depos-

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ited at the said railroad station, the plaintiff had the right to take the ground that by reason of the defendant's delay in receiving and paying for the lumber, he would not deliver it upon the contract. This he did, and the parties then, as the referee finds, and, I think, properly, entered into another contract for the sale of said lumber, whereby the defendant agreed to pay, and the plaintiff agreed to receive an enhanced price for the lumber previously contracted for, and for the purchase and sale of other lumber. This new contract was perfectly valid. It was not a parol alteration of the former written contract, but it was in substance and effect a new contract in lieu of the former one which the plaintiff refused to perform. Such new contract can be upheld, within the cases of *Meech v. The City of Buffalo*, (29 N. Y. Rep. 218 ;) *Munroe v. Perkins*, (9 Pick. 298 ;) *Lattimore v. Harsen*, (14 John. 330 ;) and *Hart v. Lauman*, (29 Barb. 410.)

Besides, the new contract was executed. The plaintiff delivered the lumber upon it, and the defendant paid thereupon \$800, October 4, thereafter, and promised to pay the balance. After this affirmation of the new contract, it was too late for the defendant to recede from it, or object to it. If the referee was correct in finding that the parties made a new contract, and that the lumber was delivered and accepted upon this new contract, he clearly was not bound to find, as requested, that the said lumber was delivered under the former contract ; or that any new consideration for the promise to pay the additional price for such lumber was necessary ; or that said new agreement was without consideration and void ; and the exceptions for his refusal so to find and decide are untenable.

None of the exceptions taken in the case, I think, are well taken.

The judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, March 4, 1867. *Wells, E. D. Smith and Johnson*, Justices.]

THE PEOPLE, *ex rel.* Frederick A. Hackley and Benjamin Wells, *vs.* THE CROTON AQUEDUCT BOARD.

49	259
60h	499
49b	259
35ap	42

The court may exercise a discretionary power, as well in granting as in refusing a mandamus; as where the end is merely a private right, and when the granting of it would be attended with manifest hardships and difficulties.

This discretion should be exercised soundly, and in accordance with the peculiar circumstances of the case.

The defendants issued proposals for the building of a stone tower, engine house, &c. under a statute giving them authority for that purpose. The relators were the lowest bidders for the work, but the defendants refused to award the contract to them, or to any one else, for the alleged reason that no appropriation to cover the expense existed; and that since the time the proposals were received, they had materially changed and altered the design and character of the work to be done; and that they had decided that the public interests required that the work should be re-advertised and let under proposals framed in accordance with such alterations. *Held* that the issuing of the notice inviting proposals did not, alone and of itself, bind the defendants to award the contract to the lowest bidder, or create any obligation on their part, to award it at all. But that if the bids were extravagant, or far beyond the amount of the contemplated expenditure, they might, in their discretion, reject them altogether.

Held, also, that under the circumstances, it would not be a proper exercise of judicial power to grant a *mandamus* to compel the defendants to award the contract for the work in question to the relators.

The 4th section of the act of April 7, 1863, (*Laws of 1863, ch. 95*), authorizing the Croton Aqueduct Board to construct the work therein mentioned, and to purchase the materials necessary for the same, "at such places, and in such manner, by contract, as they may deem the public interests require," is inconsistent with the first section of the act of 1861, (*Laws of 1861, p. 702*), which enacts "that all contracts by and on the behalf of the mayor, aldermen and commonalty of the city of New York shall be awarded to the lowest bidder for the same, respectively, with adequate security; and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids;" and the act of 1863 being the latest enactment, its effect is to except the Croton Aqueduct Board from the operation of the act of 1861, and, to that extent, to repeal that act.

THIS is an appeal from an order denying a motion for a peremptory mandamus, made for the purpose of compelling the Croton Aqueduct Board to award to the relators a certain contract for building a stone tower, engine house, or boiler house, at or near 173d street, near the high bridge.

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It appears from the papers on the motion, that prior to the 3d day of August, 1866, the Croton Aqueduct Board, under the authority conferred upon them by an act of the legislature of this state, passed April 7, 1863, page 152, and Laws of 1864, page 628, advertised for and issued proposals for building a stone tower, engine house and boiler house, near 173d street, and thereby declared that proposals for the work would be received at the office of the Croton Aqueduct Board until 11 o'clock A. M. of August 3, 1866, at which hour the bids would be publicly opened and read, and the award of the contract made. That by reason of such advertisement and invitation for proposals, the relators made an offering for the work to be done, in due form, tendering adequate security for the faithful performance of the contract, on the 2d day of August, the day prior to the opening of the bids and the proposed award of the contract.

On the 3d day of August, at the time and place named in the advertisement and in the proposals issued by the Croton Aqueduct Board, the comptroller of the city, and the commissioners of the Croton Aqueduct Board, met to open the proposals that had been made by many parties for the work. The proposals for the work were then and there opened, the various bids for the work announced, and it was then and there declared, by the board, that the relators were the lowest bidders for the work. But no award of the contract was made to the relators, or to any other person.

The relators claim that they are entitled to the contract, because they were the lowest bidders in answer to the advertisement for proposals, of the Croton Aqueduct Board.

The respondents, in answer to the application for a mandamus, show that no appropriation existed covering the expense of the work mentioned in the proposals received and opened by the board on the 3d of August, 1866, the same having been exhausted prior to the 18th of July, 1866. That soon after the 3d of August, 1866, the relators were informed, by the Croton Aqueduct Board, that no award of

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contract would be made under the proposals received that day, for the reason that no appropriation to cover the expenditure of the contract then existed. That since that time the members of the Croton Aqueduct Board, in accordance with what they deem for the best interest of the public, have extensively and materially changed and altered the amount, character and design of the work to be done, from what was required by the advertisements issued in July, 1866, and the proposals received thereunder; and that they have decided, and are of the opinion, that the public interests require that the work should be re-advertised and let under proposals framed in accordance with such alterations.

The respondents claim that by the fourth section of the act of 1863, they are vested with a discretion which authorizes them, at their pleasure, to refuse to award the contract to any person bidding for the same. The case was submitted on written points.

Wm. F. Allen, for the appellants.

Richard O. Gorman, (counsel for corporation,) and

W. C. Trull, for the respondents.

By the Court, MILLER, J. The court may exercise a discretionary power, as well in granting as in refusing a mandamus, as where the end is merely a private right, and when the granting would be attended with manifest hardships and difficulties. (*Van Rensselaer v. Sheriff of Albany County*, 1 Cowen, 501. *The People v. The Canal Board*, 13 Barb. 432, 450. *Ex parte Fleming*, 4 Hill, 583. 2 John. Cas. 2d ed. 217, note.) This discretion should be exercised soundly, and in accordance with the peculiar circumstances of the case. I think that in the case under consideration it would not be a proper exercise of judicial power, under the authorities cited, to grant the writ. There are some circumstances

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which render it at least exceedingly doubtful whether the discretionary power of the court would be properly employed in granting the remedy sought. The defendants issued proposals for the building of a stone tower, engine house, &c. at Carmansville, under the act of the legislature conferring upon them authority for that purpose. (*Laws of 1863, ch. 95, p. 152.*) The relators were the lowest bidders for the work, but the defendants have refused to award the contract to any one, for the alleged reason that no appropriation to cover the expenditure of the contract then existed, and that since the time when the proposals were made, they have materially changed and altered the design and character of the work to be done, from what was required by the former advertisement; and that they have decided that the public interests require that the work should be re-advertised and let under proposals framed in accordance with such alterations. By the fourth section of the act in question the defendants were authorized to construct the work, and to purchase materials necessary for the same, "at such places and in such manner, by contract, as they may deem the public interests require." By the notice issued they did not obligate themselves to award the work to the lowest bidder; and I do not understand that the issuing of proposals, alone and of itself, created an obligation thus to dispose of it. It was a mere notice that bids would be received, and if perchance they happened to be extravagant, or far beyond the amount of the contemplated expenditure, I think ordinarily there would be a discretionary power to reject them altogether.

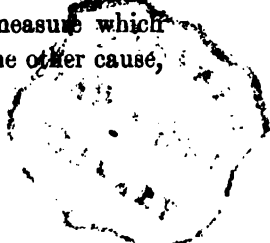
If an individual issues proposals for bids for the erection of a building or any other work, and he finds upon opening them that they far exceed his views or his means, he does not thereby bind himself to the contractor who purposes to take the job, and who happens to be the lowest in the scale of prices. He has a right to determine whether he will proceed to the completion of the work proposed or not. Under

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ordinary circumstances the same rule would apply to public bodies, unless there is some positive enactment which interferes with or prevents its enforcement.

It is insisted that the relators were entitled to a contract as the lowest bidders, in accordance with the provisions of the act of the legislature which enacts "that all contracts by and on behalf of the Mayor, Aldermen and Commonalty of the City of New York, shall be awarded to the lowest bidder for the same, respectively, with adequate security; and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids," &c. (*Laws of 1861, p. 702, § 1.*) This act was passed prior to the act of 1863, before cited, and the provision of the 4th section of the latter act, which authorized contracts to be made as the public interests might require, is inconsistent with the act of 1861; and as the latest enactment, it would seem to be a modification of the act of 1861, in respect to the Croton Aqueduct Board. It is at least questionable, whether it was not intended to except the defendants from the operation and effect of the act of 1861, and to that extent to repeal that act. I am inclined to think that such is its legitimate effect, and that in this particular it is a direct alteration of the act of 1861.

It may also be remarked, that it is doubtful whether the act of 1861, which was evidently intended to prevent corruption and favoritism in the distribution of contracts, was designed to embrace, and actually embraces a case where no contract whatever has been awarded, and where the public welfare would seem to require that the proposed improvement should be abandoned by reason of exorbitant prices demanded for the work, far exceeding any appropriation made or contemplated, or on account of combinations among contractors, detrimental to the city, or for other good and sufficient causes, which would lead honest and faithful public officers to hesitate in carrying into effect a measure which for any of the reasons adverted to, or for some other cause,



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threatened to be ruinous and destructive to the interests committed to their charge, or which, in consequence of untoward circumstances, not foreseen or anticipated, may have become entirely useless and unnecessary.

With so many difficulties in the way ; so many objections urged, some of which are of a formidable character, it is at least a matter of some hesitation, whether the exercise of a sound discretion would warrant the issuing of a writ of mandamus in the case at bar. But, independent of these considerations, it would be a very questionable exercise of a discretionary power, in a case like this, where public officers acting in good faith have deemed it necessary to make material alterations in a contract proposed, to grant an order requiring them to carry out and enforce an old and abandoned contract. It would be far better, and equally answer the ends of justice, to leave the parties, if they have any legal rights, to the remedy which they may have in an action at law for damages.

As a general rule, when a party has an adequate remedy by action for damages, a mandamus should not be allowed. (*Shipley v. Mechanics' Bank*, 10 John. 484. *Boyce v. Russell*, 2 Cowen, 444. *The People v. President, &c. of Brooklyn*, 1 Wend. 318. *Ex parte Lynch*, 2 Hill, 45. *Ex parte Fireman's Insurance Co.*, 6 id. 243. *The People v. Judges of Oneida*, 21 Wend. 20.) It has been held in some cases that corporations and ministerial officers may be compelled, by mandamus, to exercise their functions according to law, notwithstanding they may be liable in an action, for a refusal. (*McCullough v. The Mayor of Brooklyn*, 23 Wend. 458. *People v. Steele*, 2 Barb. 397.) This doctrine was questioned, however, in *The People v. Supervisors of Chenango Co.*, 11 N. Y. Rep. 563,) and it is by no means clear that any exception is made against corporations. The writ of mandamus, however, will not issue in a case of doubtful right. It will only lie to enforce a clear legal right, and when a

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remedy at law is wanting or doubtful. (1 *Kernan*, 543. 13 *Barb.* 444. 10 *id.* 366. 14 *John.* 416.)

As already suggested, there is considerable question whether the right of the relators is entirely clear. If it be so, then the remedy by action is equally clear, and it would be needless to allow a summary process to enforce a contract which it has been deemed inexpedient and improper to carry out, instead of leaving the parties to the accustomed mode of redress, by an action in a court of justice.

As I have arrived at the conclusion that in the exercise of a sound discretion a writ of mandamus should not issue, it is not important to examine and consider some other objections urged.

The order appealed from, for the reasons given, must be affirmed, with costs of the appeal.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clarke and Miller, Justices.*]

 OSBREY vs. REIMER and MECKE.

By an agreement between the parties, dated February 11, 1861, reciting that they had agreed to continue the connection between them for three years from January 1, 1861, in the same way as theretofore, it was stipulated that the arrangement made with the plaintiff was to share the profits or losses of the defendants' business in the above mentioned time, at the rate of 17½ per cent; but that it was not to convey to the plaintiff the right of partnership in the defendants' firm, of signing the name of the firm, &c. and that he was to superintend as salesman the department of general dry goods; that the plaintiff should be at liberty to draw \$2500 a year in monthly installments, for his personal and other expenses; that the capital then standing to his credit on the books of the firm, as well as the surplus of profits for the next three years, if any, should remain in the business, to his credit, at seven per cent interest during the term of the agreement; that in case of the death of either of the defendants, during the three years, the agreement was to remain in force with the surviving partner if he should continue the business; and that in case of the death of the plaintiff, the books of the firm might be balanced either on the 31st of December, or 30th of June, whichever date might follow

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after his death, and the balance found due to him should be paid to his representatives.

Held, 1. That whatever might be the character of the parties in respect to creditors or others, as between themselves they were not copartners.

2. That the provision in the agreement, that in case of the plaintiff's death, the books of the firm might be balanced either on the 31st of December, or 30th of June, excluded the idea that they should be balanced at any other time within the three years.

3. That as the accounting was not to be made until the expiration of that period, the profits and losses were to be calculated upon the whole, and not upon any fractional part of it—not upon every year, or month, or week within it; but that the gross profits and losses of the specified term of the contract were to constitute the elements of the accounting.

Accordingly *held* that the conclusion of the referee, "that the defendants had no right to charge the plaintiff interest on losses for the first year, nor to reduce the amount loaned them by the plaintiff, in consequence of such losses," was correct.

A PPEAL by the defendants, from a judgment entered upon the report of a referee.

The action was for an accounting. The plaintiff claimed that the defendants had made a contract with him, whereby he had become a partner in their business from January 1, 1861, to January 1, 1864; that he had put in over \$8000 as capital; and that he was to have $17\frac{1}{2}$ per cent of the profits, and bear a like proportion of the losses. The dispute was in respect to the assets of the defendants on hand at the expiration of the contract. The plaintiff claimed that he was entitled to $17\frac{1}{2}$ per cent of these assets. The defendants denied this, and claimed that he was only entitled to $17\frac{1}{2}$ per cent of the actual profits made during the term of the contract, including, of course, debts due to the defendants at its expiration, but not collected until afterwards. The defendants also denied that there was any partnership whatever between the plaintiff and themselves.

On the trial before the referee, the plaintiff being examined as a witness in his own behalf, testified that he had a written proposition as to his connection with the defendants; witness being shown a paper, says: "It is signed in firm name; was handed to me by one of the defendants; I ac-

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cepted the proposition in writing." The paper was thereupon put in evidence, and was as follows :

"NEW YORK, February, 11, 1861.

Frederick L. Osbrej, Esq.—Present. Dear Sir : Having mutually agreed upon to continue the connection between yourself and ourselves for the next three years, viz. from January 1, 1861, to January 1, 1864, in the same way as heretofore, we beg to repeat to you, that the arrangement made with you is, that you are to share the profits or losses of our business in the above mentioned time at the rate of seventeen and one half per cent. It is, however, distinctly understood that this arrangement is not to convey to you the right of partnership in our firm, of signing the name of the firm, &c. and that you are to superintend as salesman, &c. as heretofore, the department of general dry goods of our business, and that you are, during the continuance of this agreement, to devote all your time and ability for the benefit of our business.

For personal and other expenses you are at liberty to draw from our firm \$2500 per annum, in about equal monthly installments, and the capital at present standing to your credit on our books, as well as the surplus of profits for the next three years, if any, shall remain in our business, to your credit, at seven per cent interest, during the pending of this agreement.

In case of the death of either Frederick W. Reimer or John A. Mecke, during the time of this ageement, the same is to remain in force with the surviving partner, in case he should continue the business till its termination. In case of your death during the pending of this agreement, it is agreed that the books of our firm are to be balanced on either the 31st of December or 30th of June, which ever date may first follow your decease, and that whatever balance may be found due to you is to be paid to the executors or administrators

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of your estate, within nine months of such balancing of the books of our firm.

All contracts of former dates of course expire by this agreement.

Hoping that our mutual intercourse and exertions during the pending of this agreement will be agreeable and profitable to all of us, we remain, expecting your confirmatory answer,

Dear Sir, yours very truly,

REIMER & MECKE."

At the close of the testimony, the referee found the following facts and conclusions of law, viz: On or before January 1st, 1861, the defendants were partners, doing business as merchants in the city of New York. On or before that day, the plaintiff and defendants entered into an agreement whereby the plaintiff agreed to work for the defendants for three years, from the 1st day of January, 1861, until the 1st day of January, 1864, on the following conditions, to wit: The defendants were to give the plaintiff, in consideration of his services, seventeen and a half per cent of the profits of their business for three years, during the pendency of the contract. The plaintiff was to let the defendants have the use of \$8215.65, which sum they then owed him, at the rate of 7 per cent per annum. The plaintiff was to leave any profits found to be due him during the three years in the hands of defendants, and was to be paid seven per cent per annum for the use thereof. The plaintiff was to draw from the firm, in monthly installments, the sum of \$2500 each year. The plaintiff was to share the profits and losses of the defendants' business to the amount of seventeen and a half per cent, during the three years the contract was to run. The parties entered upon the performance of the above contract. That the plaintiff did give his services to the defendants for the whole period thereof; did let them have the use of \$8215.65, according to the agreement, and did leave his surplus profits with the defendants. He found the following to be a correct

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statement of the accounts between the parties hereto, at the date of the report, and the profits of the three years. The net profit realized during the term of the contract, to wit, three years, amounted to the sum of \$26,494.06, after deducting all the losses of the said business, exclusive of settlements made subsequent to the commencement of this action, and specified in a statement of accounts annexed to and made a part of the report. He found that of the outstanding debts uncollected, and which have been stated as suspended and considered as worthless by the defendants in their account, the plaintiff was entitled to seventeen and a half per cent thereof, as the same may be collected from time to time by the defendants, a list of which was annexed to and made a part of the report; and that the defendants have collected since the commencement of this suit the sum of \$2443.03 of said debts, of which the plaintiff has been allowed his share thereof, as appeared by the statement of the accounts in the report.

Upon the foregoing facts, the referee arrived at the following conclusions of law:

1st. That the plaintiff and the defendants were not copartners in trade, under the said contract.

2d. That the plaintiff was not entitled to any part or share of the goods of the defendants left unsold at the termination of the said contract, or to the profits arising out of the sale of the same after the determination thereof.

3d. That the contract was an entire one, and the share which the plaintiff was to receive did not depend upon the profits and losses of a single year, but of the three years.

4th. That the defendants had no right to charge the plaintiff interest on losses for the first year, nor to reduce the amount loaned them by the plaintiff in consequence of such loss. That the plaintiff engaged for three years, and had a right to an accounting on the final result at the expiration of the three years; that the capital and labor of the plaintiff was not withdrawn or separated from the said business at the

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expiration of the first year, but that the same remained in it, and helped to make out the final result.

5th. That there being no losses at the end of the contract, the plaintiff was entitled under it to be paid the \$8215.65, with interest at seven per cent.

6th. That the plaintiff had a right to demand and receive the seventeen and a half per cent of the profits arising for the period of three years ; and that the defendants were liable to account to him on that basis.

7th. That the whole amount was due and payable at the end of the three years, to wit, the 1st day of January, in the year 1864, and that the plaintiff was entitled to interest from said day.

8th. That the plaintiff was entitled to be paid hereafter seventeen and a half per cent on the balance of the uncollected debts which had been stated as suspended by the defendants in their account, as the same may be collected from time to time by the defendants.

And that the plaintiff was entitled to judgment (after deducting all payments made by the defendants to him on account thereof) for the sum of three thousand three hundred and forty dollars and forty-seven cents, and to a decree to carry this judgment into effect, with costs.

Geo. C. Barrett, for the appellants. I. The referee clearly erred in striking out the debits for interest upon losses and moneys drawn out. There was no evidence of any kind in the case upon which to base this finding. The only testimony in reference to the account and these items of interest, was that of Lang, and he testified to the direct opposite of the finding.

II. The charges for interest were evidently contemplated by the agreement. It was also the defendant's customary mode of keeping the accounts, as between themselves, and also as between themselves and the plaintiff ; and it is the universal custom of merchants. The plaintiff had been with the

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defendant since 1855 upon similar arrangements, and the accounts had always been so kept and acted upon by all the parties, without objection or complaint by the plaintiff, but to his perfect satisfaction.

III. It is impossible to sever the items of interest from the rest of the account, and accept the remainder as the basis of any thing. The profit and losses, as stated in the account, are based and calculated upon these interest debits and credits, which are interwoven with the accounts. Strike out the interest, and the items of profits and losses are inaccurate, and the accounts must be remodeled upon another basis. Yet the referee, without asking the defendant to account upon the basis laid down by him, takes such items as are favorable to the plaintiff—inaccurate though they be upon this basis—from the rejected account, and renders his judgment thereon.

IV. The defendants are also debited in like manner with interest on the losses of the business, &c. Now, if the plaintiff is not debited, then the defendants should not be, and their profits are seemingly proportionately increased. But this is a delusion; for a moment's reflection will make it perfectly clear that the net profits of all parties will come out precisely the same as though all parties had been charged with their proportion of interest. In fact, the result is inevitable, and cannot be changed by the allowance or disallowance of interest. But if the defendants are debited with interest on their share of the losses, and the plaintiff is exempted therefrom, it simply changes the latter's interest in the concern from about $17\frac{1}{2}$ per cent to about $25\frac{1}{2}$ per cent, and quietly reduces the defendants' interest to what remains. This is self-evident, and requires no further elucidation; and it solves the whole problem of the accounts.

V. And look at it in still another aspect. The amount of profits stated in the account to have been earned in the year 1862, is partly estimated upon the interest on the losses of 1861. Strike out this interest, and charge the concern with interest on its full capital, as if this had not been materially

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reduced by these losses, and it is apparent that the firm has earned very much less profits in 1862 than that specified in the account ; and so on in 1863. The profits specified, *and adopted by the referee*, become thus materially reduced, and are no criterion of the amount of the total net profits of the three years, treating the contract as entire, just as he does. These net profits of the entire three years would be reduced, upon the referee's basis, *to exactly such an amount* as would realize to the plaintiff (upon a calculation of $17\frac{1}{2}$ per cent thereof) the precise amount brought out in the defendant's account as due to him.

F. N. Bangs, for the respondent. I. The expressions and implications of the agreement are all adverse to the defendants' position. The true construction of the agreement is, that in all particulars except the withdrawal of \$2500 per year, and the constant rendition of services by the plaintiff, it was performable only at the expiration of three years. The case of death was specially provided for. 1. The relation was to be continued, not from year to year, but "for the next three years." It was a contract by which the defendants meant to secure three years' services from the plaintiff. 2. Therefore, if the plaintiff had rendered his services for a period less than three years, he could have recovered nothing except in case of his death, and except, perhaps, the \$2500 per annum. (*Wolfe v. Howes*, 20 *N. Y. Rep.* 200. *Cunningham v. Jones*, *Id.* 486.) 3. If this is not clearly so upon the general words of the contract, then it is made clear by the provision authorizing the withdrawal of \$2500 per annum. That makes a case for the application of the maxim "*expressio unius exclusio est alterius*." The plain meaning of the agreement is, that nothing but the \$2500 per annum should be drawn by the plaintiff within the three years. 4. This is made more apparent still by the provision that the plaintiff's share of profits should bear interest. That clause implies that he was to forbear all demand for

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the ascertained profits until the expiration of the three years. 5. There is no express provision that the plaintiff should pay a share of each particular loss as soon as ascertained ; and to insert such a provision by construction or implication would be to act in a spirit contrary to the one which plainly governed the parties when they provided for the disposition of expected profits. The agreement was mutual ; the defendants promised to pay so much of the profits as a whole, with interest on ascertained proportions of them, at the end of three years, in return for three years' services ; and the plaintiff promised to bear his share of the three years' losses as a whole.

II. The contemporaneous construction of the parties is in accordance with our view of the contract. The defendants do not pretend that they actually paid in their respective shares of the losses, nor that they paid interest on such shares.

III. If the agreement is susceptible of a construction different from what is above contended for, yet there is no proof that the accounts were ever so stated and adjusted as to bring the plaintiff in debt for any definite balance, nor that payment of any such balance was demanded. Until that was done, interest would not begin to accrue. (*Kane v. Smith*, 12 *John*. 156. *Walden v. Sherburne*, 15 *id.* 409. *Van Beuren v. Van Gaasbeck*, 4 *Cowen*, 496. *Rensselaer Glass Factory v. Reid*, 5 *id.* 587. *Tucker v. Ives*, 6 *id.* 193.)

The rule stated in *McMahon v. New York and Erie R. R. Co.*, (20 *N. Y. Rep.* 469,) and *Van Rensselaer v. Jewett*, (2 *Comst.* 135,) does not apply, because it does not appear that the plaintiff, at the end of 1861, was able to compute the amount of losses.

IV. If the parties were chargeable with interest on their respective shares of the losses of 1861, such interest would constitute one of the assets of the firm, and be divisible as a part of the profits of succeeding years. Suppose the parties, on December 31, 1863, had paid in the \$11,511.88 of interest

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which the defendants say had accrued on the losses of 1861, there would then have been so much more to divide, and the plaintiff's share of the dividend would have been equal to his share of the interest. The result is the same, if, instead of an actual payment in, and subsequent payment out, of the interest, the interest is merely made matter of account, and, as a matter of book-keeping, first charged and then divided to the parties respectively.

V. The allowance by the referee to the plaintiff of interest on the ascertained profits of 1862 was expressly authorized by the contract, and therefore was right.

CLERKE, J. The difference between the parties arises from the assertion of the defendants, that the profits or losses of each year are separable from those of each of the other years during which the agreement was to continue, and that, consequently, the losses of 1861 being ascertained at \$82,227.75, the plaintiff was, on December 31, 1861, chargeable with, and became liable for, $17\frac{1}{4}$ per cent of those losses, upon which interest was chargeable. The solution of this difficulty depends upon the question, whether by the agreement contained in the letter of the defendants, dated February 11, 1861, the parties became copartners in trade, or whether the plaintiff was employed as the salesman of the defendant, for the specified term of three years, as an unbroken period of service.

Whatever may be the character of the parties in relation to creditors or others, it is quite clear that in relation to each other, they were not copartners. The letter to which I have referred, distinctly provides that the arrangement thereby entered into, should not give to the plaintiff the right of partnership in the firm, or of signing the name of the firm, and that he was to superintend as salesman of the department of general dry goods for the period of three years; at the expiration of which time he was to receive, as a compensation for his services, $17\frac{1}{4}$ per cent on the profits of the business, *within that time*; of course, after deducting all losses. The

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words are, "to share the profits and losses of our business in the above mentioned time, at the rate of 17½ per cent." This calculation, in order to ascertain the amount of the plaintiff's compensation, was not to be made at any fractional portions of the three years, every year, every month, or every week, but at the expiration of the whole term. Otherwise, certainly, the agreement would have provided for such an accounting. Instead of this, the letter provides that the plaintiff shall be at liberty to draw \$2500 a year, in monthly installments, for his personal and other expenses, and, in case of his death, the books of the firm may be balanced either on the 31st of December, or 30th of June, whichever date may follow after his death. This, surely, excludes the idea that they should be advanced at any other time within the three years. If the accounting, then, was not to be made until the expiration of that period, the profits and losses were to be calculated upon the whole, and not upon any fractional part of it—not upon every year, or month, or week, within it; in a word, the gross profits and losses of the specified term of the contract were to constitute the elements of the accounting. If so, the conclusion of the referee is correct, "that the defendants had no right to charge the plaintiff interest on losses for the first year, nor to reduce the amount loaned them by the plaintiff, in consequence of such losses."

The judgment should be affirmed, with costs.

LEONARD, J. I concur. The report is according to the contract. The defendants refused to pay interest on the plaintiff's capital, and on his share of the annual profits. That is the principle adopted by the referee.

WELLES, J. also concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clarke and Welles, Justices.*]

HORATIO G. ABBEY, appellant, vs. HARRIET E. CHRISTY,
respondent.

To constitute a valid publication of a will or codicil, the testator must, in the presence of two witnesses, declare the instrument to be his last will and testament, or a codicil thereto. If the proof fails to establish such a declaration, to one of the subscribing witnesses, the instrument should not be admitted to probate.

Where one of the attesting witnesses testified that on entering the testator's room, the latter, taking a paper out of his portfolio, desired the witness to read it, which he did, silently; after which the testator requested him to witness his signature; in answer to a question put by the witness, whether he had read the paper produced, the testator said he had heard it read; and being asked if it was all right, he replied "I think so;" and the other witness testified that when they entered the room the testator remarked that he wanted them to "witness his signature;" that they then put their names to the paper as witnesses; but that "nothing was said whatever, regarding what the paper was, or any thing about it," that the witness never read it, and did not know what it was; *Held* that this was not a sufficient publication.

Of the effect of an attestation clause, as evidence of the due execution of a will.

THIS was an appeal from a decree of the surrogate of the county of New York, refusing probate to certain paper writing propounded by Horatio G. Abbey as the will of Edwin B. Christy, deceased. The facts appear in the opinions of the court.

Wm. Weston, for the appellant.

B. J. Blankman, for the respondent.

G. G. BARNARD, J. The case of *Seymour v. Van Wyck*, (6 *N. Y. Rep.* 120,) is directly in point. That case decides that the testator must, in the presence of two witnesses, declare the instrument to be his last will and testament. In the case at bar such a declaration was not made.

The case in 6 *N. Y. Rep.* and the present case are quite similar in their details; the health and capacity of the testator in *Seymour v. Van Wyck* was about the same as those of the testator in this case; if any thing a little better.

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In that case one of the witnesses (Caleb Roscoe) testified : "The testator was bolstered up in bed ; he said 'I have sent for you and want you to take notice whether I have sufficient mind and memory to make a will, for I have long wanted to make an alteration in my will, and now I have had Mrs. Seymour to write a codicil to my will.' He asked for the will. The paper was lying on the bed. I said it would require two witnesses. Mrs. Seymour said Caroline See was in the house. He said 'call her.' She was called. A bible was placed on the bed. I handed the pen and ink and he signed the paper, Miss See and myself looking on. He requested me to date it and write what was necessary for the witnesses to sign, and to witness it. I did so, and subscribed it as a witness, as did also Miss See, and I folded it up."

The other witness, Miss See, testified : "Testator signed it in my presence, and requested me to witness it. Testator said 'you see I am in my right mind.' I bowed my head. He said 'speak.' I said yes. He said 'I want you to sign your name to that paper.' He was raised up in bed ; called for the paper, pen and ink and put his name to it. Mr. Roscoe signed his name to it, then I put mine ; that was the end of it ; I left the room. He did not, while I was in the room, say it was his last will and codicil, or any thing of that kind. He did not, in my presence, speak the word will or codicil."

The surrogate admitted this will to probate, but the general term reversed his decision, and the Court of Appeals affirmed the judgment of the general term, with costs to be paid by the appellant.

In the case at bar, one of the witnesses (Dr. Rogers) testifies : "When I entered Mr. Christy's room he called his attendant to pass his portfolio ; he opened it, took out a paper and desired me to read it, which I did. I read it silently. After concluding the reading I asked him what more he wished. He wished me to witness his signature.

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I asked him if he had read it ; he said he had heard it read. I then asked if it was all right ; he replied 'I think so.' His attendant was then called into the room, and he was bolstered up in the bed ; the paper was placed upon the back of a portfolio held in his lap, and pen and ink was passed to him."

The other witness (Joseph H. Morrison) testifies : "When we entered the room, Mr. Christy was propped up in bed with pillows ; he remarked that he wanted us, the doctor and myself, to witness his signature. The doctor had the document in his hand, whatever it was ; I don't know what it was ; I never read it. I saw Mr. Christy sign the paper ; the doctor put his name there, and I put mine under his ; nothing was said whatever regarding what the paper was, or any thing about it." At folio 70 he says : "I did not read a single word of the paper." At folio 73, being asked, "Have you any recollection of the precise language that Mr. Christy used in relation to the instrument ; what he called it?" The witness answered : "The man was too feeble." On the question being repeated he said, "No I could not. I think he asked in as loud a tone as he could, gentlemen I wish you to witness my signature to this paper ; he might have said document. I don't remember. I know he spoke but very few words, because he was not able to speak."

This is all the evidence bearing on the publication of the paper as a will.

The evidence falls just as far short of proving publication to the witness Morrison, as in the case of *Seymour v. Van Wyck*, it fell short of proving publication to the witness See.

Conceding that the handing the paper to Dr. Rogers, with a request to him to read it, and his reading it, was a publication as to him, yet it was not a publication as to Morrison, for two reasons ; first, the doctor read it silently so that the witness Morrison, even if at the time in the room, could not by such reading be apprised of its contents or nature, and second, this reading by the doctor was before the testator

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was propped up in the bed, and the witness Morrison did not enter the room until after he was propped up, and Dr. Rogers was there before Morrison.

The statement of Dr. Rogers that a messenger came to him stating that Mr. Christy wished him to visit him on the matter relating to the will, is incompetent to prove a publication by the testator. It is mere hearsay testimony. If it is competent at all, it only tends to prove a publication to the doctor alone.

Thus, as under the case of *Seymour v. Van Wyck*, the testator must declare the instrument to be his last will and testament to each of the subscribing witnesses, and as under the same case, the proof in this case fails to establish such declaration to one of the subscribing witnesses, the decision of the surrogate in rejecting the instrument, on the ground that it had not been proved to have been properly executed as a will, was correct.

In the cases of *Jauncy v. Thorne*, (2 Barb. Ch. 40;) *Nelson v. McGiffert*, (3 id. 158;) *Orser v. Orser*, (24 N. Y. Rep. 51;) *Trustees of the Theological Seminary of Auburn v. Calhoun*, (25 id. 422;) *Tarrant v. Ware*, (Id. 425;) and *Peck v. Cary*, (27 id. 1,) cited by the appellant, there was, except in *Orser v. Orser*, affirmative proof that the testator declared the instrument to be his will, to each of the subscribing witnesses, and the court held that when such was the case, the will might be established if such proof were sufficient to overcome either the want of recollection on the part of the subscribing witnesses that such declaration was made, or their positive denial that it was made.

In the case of *Orser v. Orser*, one of the witnesses was deceased, the other denied that he heard the decedent speak of the paper as his will, but admitted that he heard some conversation between the decedent and the other witness, which he could not remember. The court held that the attestation clause signed by a deceased witness was evidence, to some extent, of the facts stated in it, and that it was error to

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limit its force to the deceased witness, as it was also some evidence to contradict the living witness ; and for this error reversed the judgment below.

These cases are not in conflict with the case of *Seymour v. Van Wyck*, (6 N. Y. Rep. 120 ;) for that case simply decides that the proof there adduced was insufficient to establish a declaration to both witnesses ; and it is shown above that if the evidence was insufficient in that case, it is equally so in the case at bar.

In the case at bar there is no positive proof that the declaration was made to both witnesses, nor any circumstances from which it can be inferred, but on the contrary the proof is clear it was not made to one of them.

The attestation clause may in some cases, (such as death of all the witnesses,) be sufficient of itself to carry a will to probate. In other cases it may be some evidence of due execution, either strong or very slight, according to the circumstances of each particular case ; but in this case its effect must necessarily be slight, and even that effect is dissipated by the circumstances of the case. This will purports to have been executed on the 26th of March, 1866. The testator died April 6th, 1866. The alleged will was presented for probate June, 1866, and the subscribing witnesses were examined in December, 1866.

The quick following of death after the signing of the paper, the short time elapsing between the death and the offer to probate, the not very long period between the offer to probate, and the examination of the witnesses, are all circumstances tending to impress on the witnesses' minds the matter transpiring at the time the paper was signed, and to exclude the theory that their failing to swear to a declaration being made to them is due not to the non-existence of the fact, but their want of recollection.

Now we not only have Morrison distinctly swearing that no declaration was made to him, but the testimony of Dr. Rogers clearly shows that no declaration was made to

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Morrison, nor indeed to himself, except only by the handing to him of the paper to read, and his silently reading it. The particularity of Dr. Rogers' testimony as to what occurred is such, that if any declaration had been made, he would surely have recollected it. The whole evidence was before the surrogate, and we must assume he gave due weight to the attestation clause.

The appellant claims there was error in refusing to permit him to adduce further proof as to the execution of the paper. The return, however, does not show any such refusal. It is true the surrogate, after the proponents had closed their examination of the witness Morrison, stopped the cross-examination, stating that as the execution of the will had not been proved, he would be obliged to reject it. After this intimation of his opinion on the evidence already adduced, the proponents did not offer or suggest that they had any further proof on that subject. We cannot assume, that if they had so offered or suggested, the surrogate would have refused to hear it. On the contrary, we must assume that he would have heard it.

The appellant cannot now, for the first time, suggest that he has further proof, and reverse the surrogate's decision for not receiving proof, the existence of which was not even intimated to him.

The suggestion now made here, for the first time, looks very much as if the proponent knew he had no witnesses whom he dared call, but now makes the intimation to impress the court with the idea that he has been harshly dealt with below.

The surrogate's decree should be affirmed, with costs, to be paid by the appellant.

CLERKE, J. I. I find no evidence in this case to controvert that of Dr. Rogers, who positively testifies that the physical condition of the testator was paralysis, and that "the effect of it upon the mind was to weaken it, in all respects." The

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witness attended him, professionally, in his last illness, from the beginning of March until the 5th or 6th of April, 1866, when he died. The symptoms of mental disease increased to the time of his death. His principal ailment was disease of the brain; which produced such unsoundness of mind as rendered him incapable of making his will. This, I presume, was the conclusion of the surrogate; which, I think, should not be disturbed.

II. I say, I presume this was the conclusion of the surrogate, although it might be inferred from his language, at the trial, that he placed his decision on the ground that the testator had not declared the instrument to be his last will and testament. If this is the ground of his decision, I also think it is correct. In the recent cases referred to by the appellant's counsel, either one of the witnesses testified to the declaration of the testator, or some other person in his presence made it, in effect, for him, or other circumstances occurred at the time of execution, which imported it; but there is no fact, or circumstance, in the present case, from which a publication of the will can be inferred; except that in answer to the question put by Dr. Rogers, whether he had read the paper produced, he replied that he had heard it read. Dr. Rogers then asked if it was all right; he replied, "I think so." This is not sufficient. Morrison, the other witness, who was present all that time, testifies that the testator, when they entered the room, was propped up with pillows, and "he remarked that he wanted us, the doctor and myself, to witness his signature." They then put their names to the paper, as witnesses; "but," he adds, "nothing was said whatever regarding what the paper was, or any thing about it."

The decision of the surrogate should be affirmed, with costs.

LEONARD, J. concurred.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Geo. G. Barnard and Clarke, Justices.*]

LIMBURGER *vs.* WESTCOTT and others.40
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A common carrier cannot limit his liability by a memorandum or note on the card or ticket which he delivers on the receipt of goods to be transported by him.

Thus, where, by a memorandum on a receipt for baggage, issued by an express company, it was stated that the "liability" of the company was "limited to \$100, except by special agreement to be noted" thereon; *Held* that in the absence of any knowledge by the owner of the baggage of such condition there was no consent to it by him, and no bargain between the parties, limiting the liability of the company.

A PPEAL from a judgment entered upon the report of a referee. The action was brought to recover of the defendants, as carriers, under the name of "Westcott's Express," the sum of \$300 for the loss of the plaintiff's baggage. The defendants set up as a defense, a special contract, limiting their liability to \$100, in case of loss. On the trial before the referee, Robert F. Westcott being duly sworn as a witness on the part of the defendants, testified: "I am superintendent of Westcott's Express, and have been since 1861. (Exhibit A shown witness.) This is a receipt for baggage; it is issued by Westcott's Express. These receipts are given either at the office when the order to perform the service is left, or at the house on reception of baggage. The numbers 4292 and 4292½ on this paper refer to two pieces of baggage, and the same numbers are put upon the baggage for which the receipt is given." (Paper read in evidence and marked Exhibit A.)

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which the defendants say had accrued on the losses of 1861, there would then have been so much more to divide, and the plaintiff's share of the dividend would have been equal to his share of the interest. The result is the same, if, instead of an actual payment in, and subsequent payment out, of the interest, the interest is merely made matter of account, and, as a matter of book-keeping, first charged and then divided to the parties respectively.

V. The allowance by the referee to the plaintiff of interest on the ascertained profits of 1862 was expressly authorized by the contract, and therefore was right.

CLERKE, J. The difference between the parties arises from the assertion of the defendants, that the profits or losses of each year are separable from those of each of the other years during which the agreement was to continue, and that, consequently, the losses of 1861 being ascertained at \$82,227.75, the plaintiff was, on December 31, 1861, chargeable with, and became liable for, 17½ per cent of those losses, upon which interest was chargeable. The solution of this difficulty depends upon the question, whether by the agreement contained in the letter of the defendants, dated February 11, 1861, the parties became copartners in trade, or whether the plaintiff was employed as the salesman of the defendant, for the specified term of three years, as an unbroken period of service.

Whatever may be the character of the parties in relation to creditors or others, it is quite clear that in relation to each other, they were not copartners. The letter to which I have referred, distinctly provides that the arrangement thereby entered into, should not give to the plaintiff the right of partnership in the firm, or of signing the name of the firm, and that he was to superintend as salesman of the department of general dry goods for the period of three years; at the expiration of which time he was to receive, as a compensation for his services, 17½ per cent on the profits of the business, *within that time*; of course, after deducting all losses. The

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words are, "to share the profits and losses of our business in the above mentioned time, at the rate of 17½ per cent." This calculation, in order to ascertain the amount of the plaintiff's compensation, was not to be made at any fractional portions of the three years, every year, every month, or every week, but at the expiration of the whole term. Otherwise, certainly, the agreement would have provided for such an accounting. Instead of this, the letter provides that the plaintiff shall be at liberty to draw \$2500 a year, in monthly installments, for his personal and other expenses, and, in case of his death, the books of the firm may be balanced either on the 31st of December, or 30th of June, whichever date may follow after his death. This, surely, excludes the idea that they should be advanced at any other time within the three years. If the accounting, then, was not to be made until the expiration of that period, the profits and losses were to be calculated upon the whole, and not upon any fractional part of it—not upon every year, or month, or week, within it; in a word, the gross profits and losses of the specified term of the contract were to constitute the elements of the accounting. If so, the conclusion of the referee is correct, "that the defendants had no right to charge the plaintiff interest on losses for the first year, nor to reduce the amount loaned them by the plaintiff, in consequence of such losses."

The judgment should be affirmed, with costs.

LEONARD, J. I concur. The report is according to the contract. The defendants refused to pay interest on the plaintiff's capital, and on his share of the annual profits. That is the principle adopted by the referee.

WELLES, J. also concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clarke and Welles*, Justices.]

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time of the receipt thereof by her, for the damages sustained by her, by reason, and in consequence of, the loss of said trunk, and its contents.

Third. That the plaintiff could only be so indemnified by recovering from said defendants the value of property so lost, at the time of the trial of this action.

Wherefore, he was of opinion, and did adjudge and determine, that the plaintiff was entitled to recover from the defendants the said sum of \$350 ; for which sum, together with the costs of this action, he directed a judgment in favor of the plaintiff against the defendants.

L. A. Lockwood and C. A. Seward, for the appellants.
I. Carriers have a right to affix conditions of acceptance of articles for carriage, provided, 1st. That the conditions are not prohibited by law. 2d. That they are not unreasonable. (*Cases cited below.*)

II. The condition that the carrier shall not be liable for over \$100, for any article lost, unless the value is stated to him and the extra risk is paid for, is not unlawful or unreasonable. The law compels the carrier to carry the goods, in the line of his business, of every person, on payment of a reasonable compensation. The law does not fix the amount of compensation that may be demanded. It requires only that it shall be reasonable. It is not unreasonable. (1.) \$100 is more than the average value of articles carried. (2.) The carrier, being an insurer, is entitled to premium proportionate to the risk assumed. (1 *Pars. on Cont.* 711.) (3.) The extensive business of carriers, and the benefit conferred by them upon the public, require they should have this protection, except in cases of fraud or conversion. (4.) Occasional losses are unavoidable, and the bare fact of non-delivery of an article affords no presumption of willful negligence or bad faith.

III. The delivery of the carrier's receipt containing the \$100 limitation clause, to the sender, at the time of receipt of the baggage, and the delivery of such baggage by the

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sender to the carrier, form a contract between them. (*Wills v. N. Y. Central R. R. Co.*, 10 *N. Y. Rep.* 181. *Dorr v. The N. J. Steam Nav. Co.*, 1 *Kern.* 485. *Meyer v. Harnden's Ex.* 24 *How.* 291. *New trial of same*, *N. Y. Transcript*, March 16, 1864. *Moore v. Evans*, 14 *Barb.* 524. *Parsons v. Monteath*, 13 *id.* 353. *Perkins v. N. Y. Central R. R. Co.*, 24 *N. Y. Rep.* 215. *Smith v. Same*, *Id.* 223. *Bissell v. Same*, 25 *id.* 445. *The N. J. Nav. Co. v. Merchants' Bank*, 6 *How. U. S.* 382. *Breese v. U. S. Telegraph Co.*, 45 *Barb.* 274. *York Co. v. Cent. R. R. Co.*, 3 *Wallace*, 107. *Moriarty v. Harnden's Ex.* 1 *Daly*, 227.)

IV. That the sender did not read or know the contents of the receipt is his own fault, and does not affect the question. (104 *Eng. Com. Law*, 75. *Com. Bench*, *N. S.* vol. 12. *Breese v. U. S. Tel. Co.* above cited. *Shaw v. Railway Co.*, 66 *Eng. Com. Law*, 347. *York, Newcastle and B. Co. v. Crisp*, 25 *Eng. Law and Eq.* 396. *York Company v. Cent. R. R.* above cited.) From the nature of the carrier's business it was impossible for him to do more than to deliver, to the sender, printed conditions of his undertaking, upon the receipt delivered to the sender at the time of the receipt of the baggage, which receipt was also the evidence, to the sender, of delivery of the baggage to the carrier, and was to be held by him, as such evidence, until his receipt of the baggage. The acceptance of an offer coupled with a condition is also an acceptance of the condition.

V. That the receipt was delivered to a servant and not to the owner does not affect the matter. The trunks were left in the lower hall of Mr. Randall's house, in charge of the servant who was authorized to deliver the trunks to the defendants and who paid them for the carriage. Although no one of the family were present, yet Mrs. Randall swears that an express wagon, marked Westcott's Express, came to the house. She must, therefore, have seen it. The complaint avers delivery by her to the defendants. The defendants were authorized by the circumstances to regard the servant

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as the agent of the plaintiff, in respect to the baggage, and competent to contract for its carriage. If the defendants were not authorized to deliver the baggage, the defendants' possession was wrongful, and no contract can be implied, and this action must fall. The servant was, therefore, *prima facie* the agent or messenger of the plaintiff, *pro hac vice*, and it rested with the plaintiff to prove the contrary. By bringing this suit, the plaintiff has ratified the act of the servant. (*Bank of N. S. v. Davis*, 2 Hill, 451. *Sutton v. Dillaye*, 3 Barb. 529.) The court, therefore, must regard the servant as the agent of the plaintiff. "The exception to the common law liability being made in the bill of lading and delivered to the agent" (a carman) "of the plaintiffs, must be deemed to have been agreed upon by the parties." (*Angel on Car.* §§ 249, 250, 251. *Dorr v. N. J. Steam Nav. Co.* above cited.) There is no evidence that the servant did not read the receipt. If such servant had a right by such delivery to impose an obligation upon the defendants in respect to the baggage, she had an equal right to assent to any lawful terms by which the defendants sought to control such obligation. The delivery of the baggage and the reception of Exhibit "A" were simultaneous acts, and constituted but one contract. (*Moriarty v. Harnden's Ex.* *York Co. v. Central R. R.* above cited.)

VI. The referee erred in excluding the offers. The evidence tended to show a long established and well known custom among carriers. In connection with the testimony of the plaintiff's frequent visits in New York city, it raised a strong presumption of her knowledge of the custom.

VII. The referee erred in admitting the evidence of the value of the property on the day of trial. The measure of damage is the value of the goods on the day when the delivery should have been made. (*Sedgwick on Dam.* 225. *Sherman v. Wells*, 28 Barb. 403. *Richmond v. Bronson*, 5 Denio, 55, and cases there cited. *Wibert v. N. Y. and*

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Erie R. R., 19 Barb. 36. *Conger v. Hudson R. R. Co.*, 6 Duer, 375.)

VIII. The referee erred in the 5th finding of fact. There was no evidence that, *before the time of trial*, the value of the said trunk and contents had become and was \$350. It was admitted that the trunk and contents were lost, and their value could not be said to have increased. The witness was not an expert in the value of clothing, and her statement "they are worth twice as much now" should have been disregarded.

IX. The referee erred in his 2d and 3d findings of law, because it is not the true measure of damages. (*See case above cited.*)

X. Judgment should be ordered for the plaintiff for \$100, and costs to the date of the defendants' offer under section 285 of the Code, and costs from that time should be awarded to the defendants.

E. W. Chester, for the respondent. I. No special contract was proved. Not even a notice was proved, even if that had been sufficient. (*See Nevins v. The Bay State Steamboat Co.*, 4 Bosw. 225; *Judge Slosson's opinion*, 233; *Bissell v. The New York Cent. R. R. Co.*, 25 N. Y. Rep. 445; *Dow v. N. J. Steam Nav. Co.*, 1 Kern. 485; *Judge Parker's opinion*, 490; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Opinion of Judge Woodruff*, 137, 8.)

II. If there had been a contract, such as alleged, the defendants would have been bound to account for the trunk delivered to them and to show how it was lost, and that it was without their fault or that of their employees. Such a contract would not permit a common carrier to escape responsibility by simply alleging, in general terms, the loss of the property, and that it was not in his possession, and that, therefore, he should not be accountable for more than \$100.

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III. Neither of the defendants' exceptions on the trial was well taken.

IV. The referee adopted the right rule in regard to the value of the property lost. (*Romaine v. Van Allen*, 26 *N. Y. Rep.* 309. *Williard v. Bridge*, 4 *Barb.* 361. *Dillenback v. Jerome*, 7 *Cowen*, 295. *West v. Wentworth*, 3 *id.* 82.)

CLERKE, J. We have frequently decided, in conformity with the weight of authority, in this state, that a common carrier cannot limit his liability by a memorandum or note on the card or ticket which he delivers on the receipt of goods to be transported by him. Nothing more than this occurred in the present case; and undoubtedly the referee was correct in deciding that the indorsement on the back of the card, delivered by the defendants to the servant of the plaintiff, did not amount in law to a special contract, which alone could limit their liability. The referee adopted the correct rule as to the value of the property.

The judgment should be affirmed, with costs.

LEONARD, J. The plaintiff had no knowledge of the condition which the defendants sought to embody in the contract. Of course, there was, then, no consent to the condition, on the part of the plaintiff, and no bargain between the parties, limiting the liability of the defendant.

I concur in affirming the judgment.

Judgment affirmed.

[NEW YORK GENERAL TERM, June 3, 1867. *Leonard and Clarke*, Justices.]

EDWARDS vs. SCHAFFER and BUDENBURGH.

If a general agent has received particular instructions, which he disregards, his acts as agent are nevertheless, binding upon his principal. As between the principal and a general agent, any deviation from particular instructions will render the latter accountable to the former, for any loss he may sustain in consequence of such deviation; but, as to third parties, who may have dealt with the agent, any limitation of the authority, not communicated to them, can have no effect.

P., who purchased of the plaintiff certain goods for the defendants, was employed by the latter to transact their business in that branch of their commercial house situated in the city of New York. They had a manufacturing establishment in Prussia; they transmitted a portion of the goods there manufactured to New York, which were sold there by P., who was in the habit of purchasing goods for them there, to be used in their manufactory in Prussia. P. published notices, and wrote letters in the defendants' name; wrote orders in their name and style; and acted precisely as his principals would have acted had they been here. The firm name of the defendants was on the sign over the door of their place of business, in New York; and when payment for the goods in question was demanded, P. wrote a note, signed in the name of the firm, promising payment at an early day.

Held, that this was sufficient to show that P. was the defendants' *general agent*, acting as their representative to do everything for them which the necessities of their business here required. And that in the absence of any instrument expressly appointing him to do this, the facts showed an implied authority. Where principals accept and pay for, a portion of the goods purchased for them by their agent, they thereby dispense with any particular instructions, directing that the whole shall be delivered at once. If they design to accept no more than the portion already delivered, they should give early notice of that intent.

THIS action was brought to recover the value of goods sold by the plaintiff to the defendants, through their agent, one Portong. The action was tried before a justice of this court, without a jury, who found in favor of the plaintiff; and judgment being entered accordingly, the defendants appealed.

By the Court, CLERKE J. Portong, who purchased the goods in question for the defendants, was employed by them to transact their business in that branch of their commercial house situated in the city of New York. They have a manufacturing establishment at Magdebourg in Prussia; they

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transmitted a portion of the goods, there manufactured, to New York, which were sold here by Portong; and he again was in the habit, frequently, of purchasing goods for them here to be used in their manufactory in Magdebourg. Portong published notices and wrote letters in their name; wrote orders in their name and style; and, in short, acted precisely as his principals would have acted if they were here. "Schaffer & Budenburgh" was the sign over the door of their place of business in Cedar street, and afterwards in John street; and, after the residue of the order was completed and accepted by Portong, when the payment for it was demanded, he wrote a note, dated April 18, 1865, signed in the name of the firm, promising payment early in the following month, stating that "at present they were a little short." I think this is abundantly sufficient to show that Portong was their *general agent*. He acted as their representative, to do everything for them which the necessities of their business here required. In the absence of any instrument expressly appointing him to do this, surely the facts show an implied authority. But Portong says that he had no general power from his house to buy goods, and that the goods which he did buy, were bought under especial authority. He was authorized to buy, and did buy, from the plaintiff 71,250 pieces of gas fittings; and his instructions directed that the purchase should be entire, and not in separate portions. Even admitting this to be true, still the defendants are liable, if we are able to deduce from the whole facts which I have stated, that Portong was the general agent of the defendants in relation to their business here. The principle is well established, if a general agent has received particular instructions which he disregards, his acts as agent are, nevertheless, binding upon his principal. As between the principal and a general agent, any deviation from particular instructions will render the latter accountable to the former for any loss he may sustain in consequence of such deviation; but as to third parties, who may have dealt with the agent, any limitation of the authority, not com-

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municated to them, can have no effect. There is no satisfactory proof that such a communication was made to the plaintiff. The facts show the contrary. The whole purchase was delivered at three separate periods; those goods that were delivered at the first and second periods amounted in value to \$1977.52; those last delivered to \$1235.75, for which this action is brought. In September two thirds of the order were delivered, accepted and paid for. About six weeks afterwards, a quantity was delivered, amounting to \$205.18, on which Portong paid \$152.11; and about the 31st December, the remainder amounting to \$1136.70, was delivered to him. He sent them to the defendants in January, 1865, and in July he received a communication from them in which they declined to accept this last portion. They received and paid for the first two portions, and therefore dispensed with the particular instructions, directing that the whole should be delivered at once; and if they still desired to accept no more than the first two portions, they should have given early notice of that intent. Instead of this, they allowed several months to elapse before the plaintiff received any intimation of their intention not to accept the third portion. So that, even if the particular instructions mentioned by Portong were given to him, and were communicated to the plaintiff, at the time of the purchase, still the subsequent conduct of the agent and of the principals, relieved the plaintiff from the consequences of such a communication. He had every reason to believe that they would accept the last as they did the first two portions. To be sure Portong says that he had told the plaintiff he could not send them to the defendants, because too much time had elapsed, and that they would be shipped at his, the plaintiff's risk; but the plaintiff positively denies this; and the judge credits the denial.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, June 3, 1867. *Leonard, Clarke and Welles*, Justices.]

WILLIAMSON *vs.* WADSWORTH.

A person employed by a manufacturing corporation as its *civil engineer and traveling agent*, at a fixed salary, is a *servant* of the corporation, within the meaning of the 18th section of the act of 1848, which makes the stockholders of such corporations personally and individually liable for debts due to their laborers, *servants* and apprentices.

The decision in *Richardson v. Abendroth*, (43 Barb. 162,) approved.

Aiken v. Wasson, (24 N. Y. Rep. 482,) distinguished from the present case.

THIS is an appeal from an order of Justice POTTER, made at special term, sustaining a demurrer to the plaintiff's complaint in this action.

The plaintiff brings this action to recover from the defendant, as a stockholder in the Pacific Coast Petroleum Company, of New York, (a corporation formed under the act of 1848,) the sum of \$3791.61, being the amount of a certain judgment obtained by him against said company for services as a civil engineer and traveling agent. The plaintiff was employed by the corporation in the capacity of "civil engineer and traveling agent," at a salary of \$6000 per annum.

The only question in the court below was, whether a civil engineer and traveling agent is a *servant* under section 18 of the act of 1848, which makes the stockholders of such corporations personally and individually liable for debts due to their laborers, servants and apprentices. (*Laws of 1848, ch. 40, p. 58.*)

Samuel A. Noyes, for the appellant. I. The statute under which the plaintiff claims that the defendant is liable, is a statute extending common law privileges, and limiting common law obligations. At common law all of the corporators would have been liable as partners. (*Bailey v. Bancker*, 3 Hill, 188. *Allen v. Sewall*, 2 Wend. 327.) In granting companies, organized under the act, general exemptions, by virtue of their corporate character, and limiting their liability to specific obligations, the legislature made the statute a

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remedial statute as to all persons embraced within the clause to which a fair construction can make those specific obligations to apply. Remedial statutes should be liberally construed. (*Smith on Com. and Stat. Law*, § 347.) This is an action against a corporator and stockholder who is not only seeking to escape from his common law obligation, but from that imposed by the statute itself, by claiming that the term *servant* shall be construed in a limited and restricted sense, instead of a general sense. The well defined rule is in direct opposition to any such construction. The ordinary meaning of the words of the statute being adopted, the defendant is liable. If there is any ambiguity (which we deny) in the statute, it should be taken most strongly against the defendant. (*Smith on Stat. and Com. Law*, 650. *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 793.)

II. What is meant by the term *servant*? Webster gives the definition. He says, in a legal sense, stewards, factors, bailiffs and other agents, are servants for the time they are employed in such character. Kent, (2 Com. 258, 260,) defines a servant to be "one who serves another under a contract of hire; one who serves, or undertakes to serve, another for a stipulated consideration." Webster, again, in defining service, says: "In a general sense, the labor of body and mind performed at the command of a superior, or in pursuance of a duty, or for the benefit of another." The general meaning of the term thus clearly and unmistakably includes and covers the case of the plaintiff.

III. The plaintiff is a servant, within the meaning of the statute under consideration. (2 R. S. 5th ed. p. 662, § 41. *Richardson v. Abendroth*, 43 Barb. 162. *Conant v. Van Schaick*, 24 Barb. 87, 99.) There is not a single word in the statute from which it can be inferred that the term *servant* was used by the law makers in a restricted sense. The context shows it was not so used. The largest class to be provided for—that class least likely to be able to take care of themselves, and the most likely to be generally employed—

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is placed first in the list, under the term "laborers." This term is not used in a restricted, but in its enlarged legal sense. Next comes the term *servants*. The first word being used in a general sense, and this term (servants) being followed by the word apprentices, which is also used in a general sense, and under its full legal meaning, it is absolutely apparent that the term *servants* must have been used in its general sense.

IV. *Finally*. What was the object of the legislature in adopting the 18th section of the act on which this suit is based? It was to introduce a fundamental rule in all cases under the act, where persons are united in a corporate capacity, and when they were to be shielded from general legal responsibility, by virtue of such capacity, in pursuit of hazardous profits, that all the persons they made use of to make money, or to experiment with, in hope of making money, were to be paid for the service they performed, by the stockholders individually, if the corporate assets were insufficient for that purpose.

The plaintiff is within the words, the reason, and the law, of the provision; and the order sustaining the defendant's demurrer should be reversed, and judgment rendered for the plaintiff, overruling the demurrer, with costs.

H. & C. S. Andrews, for the respondent. I. The plaintiff was not a "laborer" or "servant" of the company, in the ordinary, natural import of those words. It is only by giving a broad interpretation, and so, by straining the language of the statute, that the plaintiff can be termed a laborer or servant in his said employ.

II. The case of *Richardson v. Abendroth*, (43 Barb. 162,) cannot be regarded as a controlling authority in this case. 1. That decision, in holding that the secretary of a corporation is a *servant* of the company, extends the operation of the statute beyond the plain, obvious and usual meaning of the words. 2. It also extends the operation of the statute

beyond the apparent reason of the enactment, which undoubtedly was the protection of the workmen, laborers and others occupying similar positions, who might naturally be regarded as least able to protect themselves. 3. No reasons are given, nor authorities cited, to sustain the decision in that case. 4. That decision obviously fails to meet the approval of his honor Justice Allen. (*See page 164.*) 5. It does not appear that the decision of the Court of Appeals, in the case of *Aikin v. Wasson*, (cited below,) was brought to the attention of the court on the argument in *Richardson v. Abendroth*, and it is difficult to believe that the construction given to the statute by the general term would have been adopted if that decision in the Court of Appeals had been before them.

III. The reasoning and the ruling of the Court of Appeals, in *Aikin v. Wasson*, (24 N. Y. Rep. 482,) are, as was remarked by his honor Justice POTTER, in giving his decision at the special term, "*decisive of this case.*" That was an action to enforce an alleged personal liability of the defendant as a stockholder in a railroad company, under the provisions of section 10 of the general railroad act of 1855, making stockholders liable for debts due to "laborers and servants," for services performed for the corporation. Selden, Ch. J. observed: "It is obvious from the nature and terms of this and other provisions of the act, as well as from a general policy indicated by analogous statutes, that the legislature intended to throw a special protection around that class of persons who should actually perform the manual labor of the company. To accomplish this design, it is not necessary that the words "laborers and servants" should receive their broadest interpretation. Indeed, such a construction would scarcely harmonize with the general scope and object of this and similar acts. In some very extended sense, the directors and other principal officers of the corporation may be considered as its agents and servants, and yet no one, I apprehend, would contend that the provision was intended for their

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benefit. The word "servants" is qualified, and to some extent limited in its meaning, by its association with the word "laborers," according to the familiar maxim, *noscitur a sociis*. It clearly would not include every one who should perform any service in any form for the company. Such a construction is repelled, not only by the apparent reason for the enactment, but by the language used, which would naturally have been far more general if such had been its object." All the judges concurred in this decision.

By the Court, CLERKE, J. The decision in *Aikin v. Was-son*, (24 N. Y. Rep. 482,) does not control the question now before us. The case is not analogous. The plaintiff, there, was a contractor for the construction of a portion of the road of the Albany Northern Railroad Company, of which the defendant therein was a stockholder. He was no more a servant of the company than any manufacturer who contracted to furnish them with rolling stock—with locomotives, or passenger cars. None are servants in a legal sense, but those who act in subordination to others, under whose order, direction and control they are acting for the time being. The employer can, in such case, direct and control every act of the *employee* connected with the particular service in which he is engaged. The one commands; the other obeys; the one is proprietor and superior; the other is merely a helper. In short the relation is that so long and well known to the law—the relation of master and servant. It requires a state of subordination, essentially different from that known in any other capacity, in which one contracts to do something for another. A person who has contracted to construct a railroad is in no such state of subordination. For a certain specified sum of money, he undertakes to construct the road within a specified time. He is not subject, in the performance of the work, to the immediate direction and control of the other party. A secretary, on the other hand, who is employed by the week, month or year, is under the continual supervision

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and direction of his employers, whom he is bound in the minutest particular relating to his employment to obey; and therefore, I think the case of *Richardson v. Abendroth*, (43 Barb. 162,) was correctly decided. The capacity in which the plaintiff in the case before us, was employed by the Pacific Coast Petroleum Company, was, in this respect, analogous to that of the secretary. He was employed as a civil engineer and traveling agent, at a fixed salary. He was, in every act relating to this employment, in subjection to the company, bound, as to the time and manner of performing his duties, to follow their directions, and implicitly obey their commands. He was, in this capacity, their subordinate helper.

He was, therefore, in my opinion, a servant, under section 18 of the act of 1848.

The order should be reversed, and the demurrer overruled, with liberty to the defendant to answer within twenty days, costs to abide the event.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clerke and Welles, Justices.*]

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64h	357
49	299
64h	400
49b	299
18ap	73

D. THOMAS VAIL and DANIEL ROBINSON *vs.* SHEPARD KNAPP
and GEORGE BRIGGS, trustees, &c.

JOHN L. THOMPSON and others *vs.* The same.

JONAS C. HEARTT and others *vs.* The same.

The latter clause of the provision of the Internal Revenue Act of the United States authorizing the collector to allow stamps to be affixed to mortgages, when they have been omitted without intent to evade the provisions of that act, or to defraud the government, but declaring that "no right acquired in good faith before the stamping of such instrument * * * and the recording thereof, if such record be required by law, shall in any manner be affected by such stamping," &c. does not apply to *chattel mortgages*, inasmuch as it contemplates mortgages which require to be recorded.

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Chattel mortgages are merely filed, and an entry made in a book kept by the clerk, of the names of the parties, the amount secured, the date, time of filing, and when due. This cannot be regarded, in any proper sense, as *recording* a mortgage.

The statute is highly penal, and should not, even in a doubtful case, receive a construction which would invalidate the security.

Under the provision of schedule "B," of the revenue act, specifying among the instruments which require to be stamped, "mortgage of lands, estate or property, real or *personal*, heritable or moveable, whatsoever, where the same shall be made as a security for the payment of any definite and certain sum of money lent at the time, or previously due and owing, or forborne to be paid, being payable," no stamp is necessary upon mortgages executed to secure the mortgagees as drawers and indorsers of drafts drawn for the benefit of the mortgagors, and payable *subsequent to the execution of such mortgages*; where no money was lent at the time, nor had any become due and owing, nor was any forborne to be paid, *being payable*.

While, as a general rule, the courts of this state decline to interfere by injunction, to restrain its citizens from proceeding in an action which has been commenced in the court of a sister state, there are exceptions to this rule; and when a case is presented, fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction, to prevent oppression or fraud. No rule of comity or policy forbids it,

Thus, where property subject to chattel mortgages held by the plaintiffs, was attached in the state of Vermont, in an action brought there, in the name of the defendants, against the mortgagors, residents of this state; which property they were about to sell; and it appeared that the property, at the time it was attached, was actually and necessarily used by the mortgagors (a railroad company) in conducting their ordinary business, and that the seizure thereof had seriously embarrassed them in transacting their business, thereby materially diminishing their ability to pay the mortgage debts; that the parties to the record in the action in Vermont were citizens of this state; that the plaintiffs were not parties to such action, and could not properly be heard therein; that the plaintiffs' mortgages, being unaccompanied by actual possession, were not, as against creditors, recognized as valid by the courts of Vermont, but were valid in New York; that the defendants had voluntarily consented to the use of their names as parties to the action pending in Vermont, and had received indemnity from another person; and that such action and proceedings were prompted by hostility to, and a desire to injure, the mortgagors, which, if successful, would impair, if not wholly destroy, the plaintiff's securities; *Held*, that the case was *special*, within the decisions of the courts of New York; and as such, justified the continuance of an injunction restraining the defendants from selling the mortgaged property, until the final termination of the action brought by them, in Vermont.

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MOTION to continue an injunction. On the 10th day of January, 1857, the defendants, as trustees of the Western Vermont Railroad Company, a corporation then in existence, leased its road, situated in the state of Vermont, to the Troy and Boston Railroad Company, to be used and possessed by them for the term of ten years from the said tenth day of January, 1857; and the lease contained a covenant, by which the lessees agreed to surrender the said road, at the expiration of said term, in as good condition as they received the same, natural wear excepted. Before the expiration of said lease, the Bennington and Rutland Railroad Company were organized under the laws of the state of Vermont, and took the place of the Western Vermont Railroad Company, and at the expiration of the said lease took possession of said road, and still hold the same.

An action has been commenced, and is now pending in the county court of Bennington county, Vermont, in the name of said Shepard Knapp and George Briggs, as such trustees, against the Troy and Boston Railroad Company, to recover damages for injuries to said road while possessed by the last mentioned company under said lease.

The plaintiffs, in the above entitled actions, and the defendants, Knapp and Briggs, reside in the state of New York, and the Troy and Boston Railroad is also situated in said state of New York. Certain personal property of the last named company, consisting of locomotives and cars to the estimated value of \$125,000, have been attached in the state of Vermont, and are there held to satisfy any amount which may be recovered against the Troy and Boston Railroad Company in the action so as aforesaid commenced against said company in the name of said Knapp and Briggs, as such trustees.

Proceedings have been commenced, under the laws of Vermont, to sell the said attached property, on the ground that it is liable to perish, waste, or to be greatly reduced in value by keeping, or cannot be kept without great or disproportionate expense, which proceeding is entertained by the per-

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son who executed said attachment on the application of the plaintiffs in said action in Vermont, and not by virtue of any order of the court in which said action is pending ; and it does not appear that such court has any immediate control thereof. The property thus attached was, at the time it was served, actually and necessarily used by the Troy and Boston Railroad Company in conducting its ordinary business. The said property was, at the time, subject to sundry chattel mortgages, which were executed by said last named company to the plaintiffs in the above entitled actions, to secure liabilities incurred for said company to enable it to proceed with its legitimate business. The said mortgages were executed in good faith, and based upon a valuable and adequate consideration, and properly filed in the clerk's office of the county of Rensselaer, but no United States revenue stamps were affixed thereto at the time of the execution thereof, nor previous to the seizing of said mortgaged property by virtue of said attachments, such stamps having been omitted in consequence of an impression that none were required because the drafts specified in said mortgages, and to secure which such mortgages were executed, were properly stamped. The mortgaged property remained in the possession of the Troy and Boston Railroad Company up to its seizure by virtue of such attachment. Subsequent to the seizure of said property the mortgagees were informed that such stamps were required, and applied to the collector of revenue for the United States in the city of Troy, and caused to be affixed to such mortgage the stamps prescribed by the United States revenue law.

Mr. Trenor W. Park, of Bennington, is the president and principal manager of the Bennington and Rutland Railroad Company.

The plaintiffs, as such mortgagees, ask the continuance of the injunction heretofore granted against the defendants, Knapp and Briggs, to prevent the sale of said mortgaged property until the final disposition of the said action against the Troy and Boston Railroad Company.

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W. A. Beach, Geo. Gould and D. L. Seymour, for the plaintiffs.

Mr. Phelps and J. H. Reynolds, for the defendants.

INGALLS, J. The foregoing are the leading facts presented upon this motion. Many of the details are omitted as not necessary to show the grounds upon which this decision is founded.

The first question which I consider is in regard to the validity of the chattel mortgages, which are attacked upon the sole ground that, in consequence of the omission to attach revenue stamps, they were and are void; so far, at least, as the attaching creditor is concerned, the seizure having been made by virtue of such attachment previous to the affixing of such stamps by the collector.

I am of opinion that if any stamps were required such mortgages were properly stamped by said collector, and thereby rendered valid and operative in this state against the attaching creditor. It is very clear that such stamps were not omitted with intent to evade the provisions of the revenue law, or to defraud the United States Government, but for the reason before stated. By section 204, of the revenue law of the United States, as contained in a pamphlet prepared under the direction of the commissioner of internal revenue, the collector was clearly authorized to allow the stamps to be affixed to such mortgages, if any were required, and whenever affixed, the said instruments could be used in the same manner, and with like effect, as if they had been originally stamped, unless the following provision of said section excludes them: "But no right acquired in good faith before the stamping of such instrument or copy thereof, *and the recording thereof*, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid." Chattel mortgages are not, in my judgment, included within such provision, as it contemplates

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mortgages which require to be recorded. Chattel mortgages are merely filed, and an entry made in a book kept by the clerk of the names of the parties, the amount secured, the date, time of filing, and when due. This cannot be regarded, in any proper sense, recording a mortgage. The statute is penal, and should not, even in a doubtful case, receive a construction which would invalidate the security. The cases cited by the counsel for the defendants, (*Meech v. Patchin*, 14 *N. Y. Rep.* 71; *Gregory v. Thomas*, 20 *Wend.* 19,) do not sustain the position assumed by the defendants; they merely decide that the effect of filing a chattel mortgage is the same as recording a real estate mortgage, in one particular, viz. to give notice. They do not decide that the terms filing and recording are synonymous, nor are they so understood. Again schedule "B," of the revenue law, found on page 105 of said pamphlet, prescribes the instruments which require to be stamped, and provides in regard to mortgages as follows: "Mortgage of lands, estate or property, real or *personal*, heritable or movable, whatsoever, where the same shall be made as a security for the payment of *any definite and certain sum of money lent at the time, or previously due and owing or forborne to be paid, being payable.*" The mortgages in question were executed to secure the mortgagees as drawers and indorsers of certain drafts, which were drawn for the benefit of the Troy and Boston Railroad Company, and payable *subsequent to the execution of such mortgages*. No money was lent at the time, nor had any become due and owing, nor was any forborne to be paid, *being payable*. I am, therefore, inclined to the opinion that the mortgages require no stamps whatever. The drafts mentioned in said mortgages were properly stamped.

It is further insisted by the counsel for the defendants, that the injunction should not be continued, because it in effect restrains proceedings in an action pending in a court in the state of Vermont.

The courts of this state, from motives of comity and public

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policy, have very properly refused, *except in special cases*, to restrain, by injunction, parties residing within its jurisdiction from proceeding in actions commenced in courts of a sister state. (*Mead v. Merritt*, 2 Paige, 402. *Schuyler v. Pelissier*, 3 Edw. Ch. 191. *Williams v. Ayrault*, 31 Barb. 364.) This rule is held very differently in England, and a review of the decisions is contained in *Hoffman's Provisional Remedies*, 302. But is unnecessary to pursue the inquiry as to what the law or custom is elsewhere, as we must be governed by the law as established in the state of New York. In *Willard's Equity Jurisprudence*, the learned author remarks, at page 348: "The court will not, *unless perhaps, in some very special case*, exercise the power by injunction, restraining proceedings which have been commenced in another state."

In *Burgess v. Smith*, (2 Barb. Ch. 276,) the Chancellor remarks: "Again, if the court has the power it must be a *very special case*, which will induce it to break over the rule of comity, and of policy, which forbids the granting of an injunction to stay the proceedings in a suit which has already been commenced in a court of competent jurisdiction in a sister state." While as a general rule, the propriety of which is apparent, the courts of this state decline to interfere by injunction, to restrain its citizens from proceeding in an action which has been commenced in the court of a sister state, yet there are exceptions to this rule, and when a case is presented, fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud. No rule of comity or policy forbids it. It remains to be determined whether the facts presented upon this motion constitute an exception to such general rule. It is not denied that the plaintiffs are *bona fide* creditors of the Troy and Boston Railroad Company, having pledged their credit, and advanced their money to aid

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the said company when embarrassed, thereby enabling it to proceed with its ordinary business, and also promoting a useful public enterprise.

The mortgages constitute the plaintiffs' security, and as there was no actual change of possession of the mortgaged property previous to the seizure thereof by said attachment, the plaintiffs would not be allowed by the law of Vermont, (as I understand it,) to assert their mortgages successfully against the attaching creditor, and consequently any effort to obtain protection in the courts of that state would be fruitless, and hence adequate relief could not be there obtained. It is in substance alleged by the plaintiffs under oath, and not denied by the defendants, that Mr. Park, who is the president and main manager of the Bennington and Rutland Railroad Company, and who is actively engaged in conducting the proceedings in Vermont, in the name of the defendants, against the Troy and Boston Railroad Company, is actuated by feelings of hostility to said company, and has declared that he would do all in his power to embarrass and injure said company, and ruin it if possible. It is further stated that upon a demand being made upon the defendants to surrender the property attached, they stated that they did not believe there was any justice in the prosecution against the company, or any validity in the claim upon which the attachment was issued, but that they had given Mr. Park permission to use their names in the proceedings, and he had agreed to indemnify them. It is true the defendants deny a portion of the statement, but do not deny that they consented to a use of their names, and that they were indemnified.

It is also alleged that said seizure of the property has seriously embarrassed the Troy and Boston Railroad Company in transacting its business, thereby materially decreasing its ability to pay the debt secured by such mortgages, and from the nature of said property being adapted to only one use, a hasty sale thereof would inevitably result in a great sacrifice. The said company is otherwise heavily in-

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debted, and the large amount which would be required to replace the said property, if sacrificed by such sale, would render payment of the mortgage debt almost, if not wholly hopeless.

It is quite evident that the mortgages are the main, if not the entire reliance of the plaintiffs, and if the property thus mortgaged is sacrificed, they must unavoidably sustain the loss. Although the proceeding by attachment in Vermont is in form, in the action prosecuted against the Troy and Boston Railroad Company to recover damages for such alleged violations of the covenant contained in the said lease, yet the proceedings to sell such property appear, by the law of Vermont, to be under the control of, and conducted by the person who executed the attachment, and he need not necessarily be a regular officer; and I do not understand that the court in which the action is pending, gives any direction, or exercises any immediate control, over such proceeding.

The plaintiffs do not seek, by injunction, to interfere with the action, or the court in which it is pending, but merely to restrain the defendants, who are citizens of the state of New York, from allowing in their names and through their agency, a sale of said property during the pendency of said action, in a proceeding to which the plaintiffs herein are not parties, and in which they cannot be heard.

It is true the defendants deny that they have participated in or have any control over such action or proceedings, and insist that by the law of Vermont they have no power to prevent the use of their names, and cite the case, *The Farmers and Mechanics' Bank v. Humphrey*, (36 Vermont Rep. 554,) in support of such position. I am not, however, satisfied from the facts detailed, that the defendants are *in fact* so situated as to be unable to prevent the sale of said property, but, on the contrary, am inclined to think that their relation to Mr. Park and the Bennington and Rutland Railroad Company is such that they can prevent such sale if they are disposed so to do. The defendants have consented to the use

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of their names in this action and proceeding against the Troy and Boston Railroad Company, under an agreement by which they are indemnified by Mr. Park, but the nature and extent of that indemnity is not stated by the defendants, and we may reasonably assume that it is commensurate with any loss or damage to which the defendants may be subjected on account of such proceedings, so that in no event are they likely to be prejudiced. It is further insisted by the defendants that the plaintiffs should seek protection from the courts of Vermont, where adequate relief can be granted them. It is by no means certain that the courts of Vermont, under the law which there prevails in regard to chattel mortgages, could protect the plaintiffs.

Again : the plaintiffs are not parties to the action or attachment proceedings, and therefore cannot be heard therein. It therefore seems improbable that the plaintiffs could secure adequate relief, not on account of any reluctance on the part of the courts in Vermont to accord to a citizen of this state the same rights and protection which would be extended to its own citizens, but on account of the embarrassment arising from a conflict in the laws of the said states in regard to the legal effect to be given to the securities under which the plaintiffs claim. In granting the injunction we deal with parties residing in this state, and do not seek to interfere with or attempt to control the action of the court in Vermont, in which the action is pending. We command our own citizens, not the court or parties residing in Vermont.

This distinction has long been recognized. In *Story's Equity Jurisprudence*, (vol. 2, § 899,) the learned commentator remarks ; " But although the courts of one country have no authority to stay proceedings in the courts of another, *they have an undoubted authority to control all persons and things within their own territorial limits.* When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and

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direct them, by injunction, to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but without regard to the situation of the subject matter of the dispute, they consider the equities between the parties and decree *in personam*, according to those equities, and enforce obedience to their decrees by process *in personam*." In *Dehon v. Foster*, (4 *Allen*, 550,) Bigelow, Ch. J. remarks: "The authority of this court as a court of chancery, upon a proper case being made, to restrain *persons* within its jurisdiction from prosecuting suits either in the courts of this state, or of *other states*, or foreign countries, is clear and indisputable. In the execution of this power courts of equity proceed, *not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy*, and duly presented for their determination. But the jurisdiction is founded on the clear authority *vested in courts of equity over persons within the limits of their jurisdiction, and amenable to process*, to restrain them from doing acts which will work an injury to others, and are, therefore, contrary to equity and good conscience. As the decree of the court in such cases is *pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending*, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country." (See also *Hilliard on Injunctions*, p. 235 ; *Dobson v. Pearce*, 12 *N. Y. Rep.* 169 ; *Field v. Holbrook*, 3 *Abbott*, 377.)

It is evident that the action now pending in the court in Vermont cannot determine the rights of the plaintiffs in this action, for the obvious reason that they are not parties to the action in Vermont, and as to them no action is pending in that state ; but there is a proceeding between other parties who are residents of this state, by which the rights of the

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plaintiffs herein are endangered. If it is in the power of the defendants to prevent a sale of the property, every consideration of justice and propriety indicate that they should exercise their influence and authority in that direction. Certainly no material injury will be likely to result to the parties interested in the action pending in Vermont. The property cannot be removed from the state, nor can it reasonably be regarded so far perishable, or liable to deterioration, or subject to such expense for its protection and preservation, as demands a sale thereof before the determination of the action to protect the rights of the attaching creditor.

Judging from the facts submitted upon this motion, an immediate sale would affect the plaintiffs in these actions very differently, as the result would probably be to jeopard if not wholly destroy these securities. The rights of these plaintiffs as mortgage creditors, in the relief sought, should not be confounded with those of the Troy and Boston Railroad Company. Whatever rights that company may have, can safely and appropriately be submitted to the protection of the court in Vermont in which the action is pending, and to which such company is a party. It is further insisted that the plaintiffs have an adequate remedy, by action, to recover damages, and, therefore, an injunction should not be granted. I do not think this proposition is sound as applied to the facts of this case; and the reasons for this conclusion have been already stated in discussing the other questions involved in this motion.

The case presented is peculiar in many of its features, and may very appropriately, in my judgment, be denominated special, within the decisions of the courts of this state, and as such, fully justifies the continuance of the injunction without violating any principle of law, comity, or policy. The following propositions are deducible:

The parties to the record in the action and attachment proceedings in Vermont, are citizens of the state of New York.

The plaintiffs herein are not parties to such action and

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attachment proceedings, and cannot properly be heard therein.

The mortgages, which constitute the plaintiffs' only security, being unaccompanied by actual possession of the mortgaged property by the mortgagees, are not, as against creditors, recognized as valid by the courts of Vermont, but are by the courts of the state of New York.

The defendants have voluntarily consented to the use of their names as parties to the action and proceedings in Vermont, and have received indemnity from Mr. Park, who is confessedly the prominent person in conducting such action and proceedings.

It is alleged, and not contradicted, that such action and proceedings were prompted by hostility to, and a desire to embarrass and injure the Troy and Boston Railroad Company, which, if successful, by causing a sacrifice of the property in question, will seriously affect the plaintiffs, by impairing, if not wholly destroying their securities.

I am, therefore, of opinion that the injunction should be continued, and that no rule of comity or public policy will be violated thereby, nor can it be urged with propriety that any want of respect is exhibited for the courts of a sister state.

[RENSSELAER SPECIAL TERM, February 28, 1867. *Judge, Justice.*]

JACOB SHULL vs. HERKIMER GREEN.

Where the complaint in a justice's court specifies several unlawful trespasses, upon certain lands of the plaintiff described therein, and the defendant interposes a plea of title as to a parcel of the lands only, the plaintiff may avoid the plea by an amendment of his complaint.

Where the defendant's plea of title covers only a parcel of the land, the justice may discontinue as to that parcel, and try the action as to the alleged trespasses upon the residue.

Where, in such a case, the action was wholly discontinued by the justice, and the plaintiff, on a trial in the Supreme Court, upon the same state of the

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pleadings, recovered damages to an amount less than fifty dollars. for trespasses committed exclusively upon that portion of the premises *not covered by the plea of title*; *Held*, that the defendant, instead of the plaintiff, was entitled to costs.

If the defendant is in the *actual possession* of a parcel of the lands described in the complaint, it is unnecessary for him to plead title thereto in a justice's court, as his possession will be a sufficient protection against any claim of the plaintiff for an unlawful entry or trespass on that parcel.

A PPEAL from an order of Justice BACON, at special term, setting aside the defendant's judgment for costs, in a suit originally commenced in a justice's court, and dismissed there upon a plea of title by the defendant. The form of the pleadings, as well as the questions presented upon the appeal, are stated in the opinion of the court. The plaintiff, on a trial of the action in the Supreme Court, recovered less than fifty dollars. As to the piece of land covered by the defendant's plea of title, the plaintiff gave no evidence to sustain his complaint, but confined his evidence to the residue of the lands.

D. Pratt, for the appellant.

Geo. A. Hardin, for the respondent.

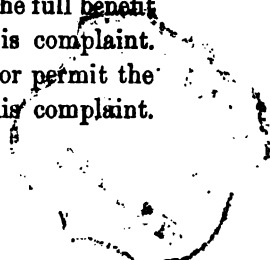
By the Court, MORGAN, J. There was no reason why the parties should have got themselves into difficulty in this case. It appears that the plaintiff sued the defendant for unlawfully entering upon his lands, at various times, and doing him damage. He described his lands by metes and bounds, which included a certain strip of land in the actual possession of the defendant. Now, it was not necessary for the defendant to put in a plea of title covering this strip of land. The plaintiff could not maintain any action in a justice's court for an unlawful entry upon land in the possession of the defendant. The question of title arising upon the trial, by the plaintiff's own showing, would have been a sufficient protection to the

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defendant, against any claim of the plaintiff for an unlawful entry, or trespass committed, on the strip of land. But the parties evidently intended to avail themselves of any advantages which might be gained by their superior skill in pleading, under the Code; and so the defendant, instead of relying upon his possession of this particular strip of land as a defense, set up title to it, and gave the necessary undertaking to oust the justice of his jurisdiction over that cause of action. Still, there were other unlawful entries and trespasses of which the plaintiff had complained, committed upon a portion of the lands described in the complaint, as to which there was no defense of title. I see no reason why the justice did not go on with these, under section 62 of the Code, leaving the parties to go into the Supreme Court to dispute about the alleged trespasses committed by the defendant upon the residue of the lands.

I agree with the learned justice, at special term, that the plea of title did not go to the entire cause of action. The complaint set forth several unlawful entries upon the plaintiff's premises. As many of them as were made upon the strip of land in dispute, were justified by the plea of title; but there was no such justification as to the residue, and no reason can be assigned why the justice could not proceed and try him.

But I am of opinion that the plaintiff might have obviated the difficulty before the justice, by amending his complaint, and confining the alleged trespasses to the other parcel of the lands. It seems he did so confine them by his proofs on the trial. A new assignment, by a formal replication, is doubtless abolished by the Code, and could not in that form have been interposed to the defendant's plea of title. This was so decided in this court. (*Stewart v. Wallis*, 30 Barb. 344.) But I am of the opinion that the plaintiff may have the full benefit of the old replication, by simply amending his complaint. Surely, the justice may permit an amendment, or permit the plaintiff to withdraw, a claim put forth in his complaint.



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This is all that is necessary to enable the plaintiff, in a justice's court, to newly assign the trespasses.

Instead of amending his complaint, or withdrawing his claim for the trespasses alleged to have been committed upon his small strip of land in controversy, the plaintiff acquiesced in a dismissal of the complaint, and afterwards brought his action into the Supreme Court, upon the same state of pleadings. It was stipulated upon the trial, in that court, that the cause had been brought there from the justice's court. But independent of such a stipulation, I think the plaintiff must fail to recover his costs. If it is regarded as an original action in the Supreme Court, (and I think it was improperly dismissed by the justice,) then it was necessary for the plaintiff to recover fifty dollars damages, in order to recover costs. If it is regarded as an action properly removed by a plea of title from a justice's court, then doubtless the plaintiff has failed to recover any damages in hostility to the title set up by the defendant, and for that reason the defendant is entitled to costs. (*Code*, § 61. *Burhans v. Tibbits*, 7 *How. Pr.* 74.)

The order appealed from should be affirmed, with \$10 costs.

Order affirmed.

[ONONDAGA GENERAL TERM, June 25, 1867. *Morgan, Bacon, Foster and Mullin*, Justices.]

SAMUEL PIKE and others vs. JOHN M. WIETING and DAMON COATS, assignees of Henry Clay Barnes.

A liquor merchant in Syracuse, in former good standing with the plaintiffs' firm in New York, gave a verbal order to the plaintiffs for a bill of goods on credit, which were sent to him by railroad and left in a storehouse at Syracuse. The merchant was in fact insolvent, and became fully aware of it before he paid the freight and took the goods into his custody; *Held*, that the judge properly instructed the jury that it would be a fraud upon the plaintiffs, sufficient to avoid the sale, if they believed, upon the evidence, that the pur-

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chaser received the goods with a preconceived design not to pay for them, although he had no such design when he gave the order.

Held, also, that the receipt by mail of the bill of goods by the purchaser, containing the terms of sale, would not take the contract out of the statute of frauds, but either party might repudiate it at any time before the actual receipt and acceptance of the goods by the purchaser.

THIS action was brought by the plaintiffs, liquor dealers in the city of New York, to recover the possession of twenty barrels of pure spirits, shipped upon the verbal order of Henry Clay Barnes after the 23d day of June, 1866, and taken from the storehouse by Barnes on the 2d day of July. The plaintiffs succeeded in finding eleven barrels, the residue having been disposed of by Barnes before the suit was commenced. The question litigated on the trial was whether the purchase was fraudulent, Barnes being insolvent and having made an assignment on the 3d day of July, the day after he received the liquor.

Several exceptions were taken to the charge of the judge by the defendants, which are sufficiently noticed in the opinion of the court. The jury having found for the plaintiffs, these exceptions were ordered to be heard in the first instance at general term.

H. B. Smith, for the plaintiffs.

D. Pratt, for the defendants.

By the Court, MORGAN, J. The evidence in this case would have authorized the jury to find that, although Barnes was actually insolvent when he gave the verbal order for the goods on the 23d of June, yet that he was ignorant of it, and had no intention of defrauding the plaintiffs at that time ; but that he was fully aware of his condition when he took the goods from the storehouse, on the 2d day of July, and then contemplated making an assignment. It appeared that he received a bill of the goods on the 27th or 28th of June, in which the price was stated and the terms of sale. The goods were billed to him on a credit of seventy-

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five days. It also appeared that Barnes had been in the habit of purchasing goods of the plaintiffs for some three years, and that his credit had been good.

The defendants' counsel requested the judge to charge the jury, that in order to sustain this action the plaintiffs must show that when Barnes purchased the goods he did so fraudulently ; that the sale was complete when the property was shipped, or at all events, when Barnes received a bill of the goods ; that if at the time the goods were shipped, and at the time Barnes received the bill of goods, he had no fraudulent intention, the plaintiffs could not recover ; that if at the time Barnes gave the order he had no fraudulent intent, the plaintiffs could not recover ; that if Barnes was honest at the time he gave the order and up to the time of the receipt of the property, although he received the property with the intention not to pay, the sale was valid ; that whether the contract of sale was complete within the statute of frauds, or not, before the actual receipt of the goods, yet when the goods were so received, it became a valid sale from the beginning.

The defendant's counsel excepted to the refusal of the judge to charge these various propositions ; and the question is, whether it was error in the judge to refuse either of them.

The judge had already charged the jury that it was important to determine when the sale was made, because the intent to defraud must have existed at the time of the sale ; and that Mr. Barnes had a right to repudiate the sale and return the goods at any time before acceptance ; and therefore the sale was not complete in law until the second day of July, when he actually accepted the property and took possession ; that if at that time he was insolvent, and received the property with the intention not to pay for it, he was guilty of fraud. The defendant's counsel excepted to these propositions.

Taking the whole charge together, and the refusal of the judge to charge the defendant's propositions, the single question presented is, whether on an *executory sale*, void by the

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statute of frauds, the intervening insolvency of the purchaser, and the preconceived intent not to pay for the goods formed at the time they are received and accepted by the purchaser, avoids the sale upon the ground of fraud. The general proposition that upon a sale of goods, the insolvency of the purchaser, coupled with a preconceived design not to pay for the property, is evidence of fraud, cannot be disputed; especially when a merchant in former good standing, knowing of his insolvency, makes a new purchase without disclosing his changed circumstances.

In *Brown v. Montgomery*, (20 *N. Y. Rep.* 292, 293,) Judge Denio, in commenting upon the case of *Nichols v. Pinner*, (18 *id.* 295,) observes: "There we decided that when a merchant, knowing himself to be insolvent, purchases goods without disclosing the fact, there being no inquiry made, he is not *necessarily* guilty of fraud, as he may honestly believe that he may go on and retrieve his affairs. * * * But the case does not countenance the position that a dealer who has been of known standing, but who has suddenly failed in business, can go to those who were acquainted with his former character, but who have not heard of his failure, and *innocently* purchase their property on credit. Judge Selden, in his opinion, put that case as not covered by the judgment."

There can be no doubt that it would have been the duty of Barnes to communicate his situation to the plaintiff when he ordered the goods, if he had then known of his insolvency. But as the case was left to the jury, the question turns upon the effect of his subsequent conduct in receiving the goods after knowledge of his insolvency. Without doubt, the evidence in this case furnishes sufficient grounds for the conclusion that when Barnes accepted the goods, on the second day of July, he not only knew that he was insolvent, but he had already commenced proceedings for making an assignment of his property; and that he did not then either expect or intend to pay for the goods.

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It was claimed on the trial, by the defendant's counsel, that the contract was complete when Barnes received the bill of goods, on the 27th or 28th of June, and some of the exceptions are founded upon that hypothesis. But I think it is too plain for argument, that an acceptance cannot be based upon the receipt of the bill by the purchaser, for he is not to be concluded until he has an opportunity of examining the goods.

The contract of purchase was not only *executory* but invalid in law, until the receipt and acceptance of the goods by Barnes on the 2d day of July. Until then it was open to either party to refuse to complete the sale.

Could Barnes dishonestly accept goods on that day, which he had honestly ordered on the 23d day of June? For the jury might have found that he intended to pay for them when ordered, but that he did not intend to pay for them when he closed the contract by his acceptance of them.

In my opinion, a purchaser of goods under an *executory* contract of sale, void until acceptance, is guilty of fraud, if before he concludes the purchase, he becomes hopelessly insolvent, and afterwards takes a delivery of them with a design not to pay. The receipt and acceptance of goods purchased under such circumstances is part and parcel of the contract; and I think the purchaser has no legal, as he certainly has no moral right, thus to deprive the owner of his property, when he neither expects to, or believes he can, pay for it; and if it is the duty of an insolvent purchaser to notify his vendor of his changed circumstances before he orders the goods, it is equally his duty to notify him when his insolvency occurs, or first becomes known to him, intermediate his order and acceptance of the property.

I think the case was fairly presented to the jury, and that the verdict must stand. The motion for a new trial should be denied with costs.

Motion denied.

[ONONDAGA GENERAL TERM, June 25, 1867. *Morgan, Bacon, Foster and Mullin*, Justices.]

CAROLINE E. WHITNEY *vs.* HAMPDEN WHITNEY.

At common law, a suit was maintainable, in equity, by a wife against her husband, to recover money, the separate property of the wife, which he had wrongfully taken and converted. And the Code having abolished the distinction between equitable actions and actions at law, and the old forms of pleadings, a complaint setting forth such a state of facts and praying judgment against the defendant for the amount taken by him and converted to his own use, states a good cause of action, and is therefore not demurrable. HOXBOM, J. dissented.

It is no objection to the complaint, in such a case, that a money judgment is demanded, instead of an accounting.

Whatever the prayer for relief may be, the judgment of the court will be according to the facts alleged and proved. And even if the party err in the nature of the relief demanded, the court will grant it according to the facts proved.

APPEAL from a judgment entered at a special term overruling a demurrer to the complaint. The action was brought by a wife against her husband. The complaint alleged that on the 1st day of April, 1866, the plaintiff was possessed, in her own right, of \$618.50, which was in her pocket book, and placed under her pillow, and was, without her consent, taken by the defendant, who refused to surrender the same to her, upon demand. The plaintiff sought to recover the same, in this action. The defendant demurred to the complaint, on the ground that a wife could not maintain an action of this nature, against her husband.

The demurrer was overruled at special term; the following opinion being given by the justice holding the term.

INGALLS, J. The demurrer to the complaint admits the material allegations of the complaint. The facts thus admitted are, that on the 1st day of April, 1866, the plaintiff was possessed, in her own right, of \$618.50, which was in her pocket book and placed under her pillow, and was, without her consent, taken by her husband, who refused to surrender the same to her, upon demand. This action is instituted to recover the same. The only question presented is, whether the action can be maintained against the defendant, who

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was, at the time the money was taken, and still is, the husband of the plaintiff.

It is clear that a common law action could not have been sustained previous to the act of the legislature, concerning the rights and liabilities of husband and wife, passed April 10, 1862. A court of equity not unfrequently interposed to protect the rights of married women in regard to their separate property. The seventh section of the act of March 20, 1860, as amended by section three of the act of 1862, provides: "Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person, in the same manner as if she were sole." This statute expressly declares that a married woman may sue and be sued in regard to her separate property, the same as if she were sole. Language more explicit could not be employed to declare the apparent intention of the legislature. The effect of modern legislation has been to confer upon married women rights and immunities in regard to their separate property which at common law they did not possess, particularly in regard to the manner of enjoying and controlling the same.

Several cases have been cited to the effect that a married woman cannot maintain an action against her husband for slander, &c. ; but the disposition of this case does not necessarily involve the question presented by that class of cases. Here the action is in relation to the separate property of the plaintiff, which is the subject expressly referred to by the statute of 1862, and in regard to which the married woman may sue and be sued. By the common law, the husband, by virtue of the marital relation, succeeded to the ownership of the personal property of the wife, and was authorized to reduce the same to possession, and retain the same. Legislation has to a great extent divested the husband of such right, and placed the property under the direct control of

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the wife. The act of 1862 provides a remedy for any violation of the rights of a married woman, in respect to her separate property. As the legislature has thus conferred upon married women the right to receive and hold property free from the control of her husband ; and the act of 1862 has provided a remedy by which such right is to be protected and enforced, viz. by action in her own name, the same as though sole ; I am of opinion that the present action can be maintained, by the plaintiff. This view harmonizes the remedy with the right, and carries out the obvious intention of the legislature. With the policy of such an innovation, the courts have nothing to do. The legislature possesses the power to enact such laws, and it is the duty of the courts to enforce them in good faith.

It is contended by the plaintiff's counsel that the complaint is in equity, and therefore the demurrer cannot be sustained. Whatever force there may be in this position, I prefer to put the decision upon the ground that the action can be sustained under the act of 1862 without regard to the consideration whether the action is to be regarded as in equity, or otherwise.

The plaintiff must have judgment upon the demurrer, with leave to the defendant to answer in twenty days, on payment of costs of the demurrer.

Judgment being entered accordingly, the defendant appealed.

J. Wagner, for the appellant.

Beach & Smith, for the respondent.

MILLER, J. The plaintiff's complaint, in this action, sets forth, with some particularity, the nature of the plaintiff's claim, and its origin. It appears thereby that the plaintiff was the owner of considerable property, part and most of

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which consisted of a house and lot, which had been exchanged for another parcel of real estate. That she sold the house and lot, and that a portion of the avails of the sale, in bank bills, was placed by her, on retiring to bed at night, in a pocket book, under her pillow, and was taken from there by the defendant, before she arose on the following morning, and disposed of and converted to his use. She asks judgment for the amount thus taken, against the defendant. It will be seen that the complaint is not in the ordinary form of a complaint in an action of trover for the conversion of personal property, but is drawn to conform to the facts as they are alleged to exist.

I am inclined to think that the action can be maintained, in the form in which it is presented in the pleadings. At common law, the wife could not maintain a civil action against her husband; but in equity she could maintain an action against him for the protection of her property, and to restrain him from its improper use and destruction. (*Freethy v. Freethy*, 42 Barb. 641.) He was also liable to account to her for her separate estate received by him without her knowledge; and equity would interpose to protect her in the enjoyment of it. (*Clancy, Rights of Married Women*, 35. *Devin v. Devin*, 17 How. Pr. 514.)

If, before the Code was enacted, the defendant had appropriated his wife's property, without her knowledge or consent, or if he had threatened its destruction, or injury to it, there cannot, I think, be any doubt but what he would be liable to a suit in equity to compel him to return it, or to prevent his improper interference with it. Now, by the Code, the distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished. There is to be but one form of action for the enforcement and prosecution of private rights, and for the redress of private wrongs. (*Code*, § 69.) The remedies, therefore, heretofore sought in a court of equity, are now only to be obtained by the ordinary forms of proceedings according

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to the established practice of the court. By that practice, all forms of pleading previously existing were abolished. (*Code*, § 140.) And it was provided that the complaint should contain a statement of the facts constituting the cause of action, and a demand of the relief to which the party claimed to be entitled. (*Code*, § 142.)

In the case under consideration, the facts are stated as they are supposed to exist, and I do not discover but that they are presented in conformity with the provisions cited and the design and intentions of the law makers to simplify pleadings, so as to present, briefly, a concise statement of the case.

The only objection which, it seems to me, can be urged with any appearance of being well founded, against the complaint is, that a money judgment is demanded. Is there any foundation for this objection? The money was actually taken, and the plaintiff seeks to recover it back. If the circumstances alleged are established upon a trial, the judgment of the court should be, that the money be refunded, or that the plaintiff have judgment for the amount.

If the prayer for relief had been for an accounting, then the decree would have been that the defendant pay over the money, if the plaintiff was successful; so, in reality, it makes no sort of difference. Whatever the prayer for relief may be, the judgment of the court will be according to the facts alleged and proved. And even if the party err in the nature of the relief demanded, the court will grant it according to the facts proved. (*Emery v. Pease*, 20 *N. Y. Rep.* 62. *Denman v. Prince*, 40 *Barb.* 219.) I think, at common law, this action was maintainable in equity, and as the Code has abolished the distinction between equitable actions and actions at common law, and the old forms of pleadings, that a case is presented, in the plaintiff's complaint, which makes out a good cause of action. The complaint, therefore, is not demurrable.

If I am correct in the views which I have expressed, then

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it is not necessary to examine the question whether the action can be maintained under the act of 1862.

The order of the special term should be affirmed, and judgment rendered for the plaintiff on the demurrer, with leave to the defendant to answer on payment of costs.

PECKHAM, J. concurred in the result.

HOGEBROOM, J. dissented.

Judgment affirmed.

[ALBANY GENERAL TERM, March 4, 1867. *Peckham, Miller and Hogeboom, Justices.*]

FANNY FAULKNER and another, adm'rs &c. of John C. Faulkner, deceased *vs.* THE ERIE RAILWAY COMPANY.

Ordinarily, an employer is not liable for injuries to one of his employees occasioned by the negligence of another employee engaged in the same general business. Such employees on entering the service take upon themselves, as an incident to the hiring, the ordinary risks and dangers arising therein, which includes the negligence or carelessness of their fellow servants.

No distinction arises from the different grades or ranks of the employees, nor from their being engaged in different kinds of work; provided the services tend to accomplish the same general purpose.

An employer is, however, responsible for injuries to employees arising from his personal neglect, or from the want of ordinary care and precaution on his part, in the selection of employees.

Where a railroad bridge was well built, of good sound materials, upon a plan in common use, and the evidence as to its strength and capacity was abundant, and its sinking was in no sense due to any defect in its original construction, but to a process of natural decay, called dry rot; and the day before it fell it had been inspected by the repairer of bridges, and the division superintendent, competent men, and examined, tested and watched under the weight of a train of cars, and was deemed by them entirely sound and safe; *Held* that the company was not liable to the representatives of an employee who was killed by the falling of the bridge, either on the ground of a defect in its construction constituting negligence, or want of ordinary care, or by reason of the employment of incompetent, unskillful or improper persons to examine the bridge.

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Held, also, that to render the company liable, on the latter ground, it must affirmatively be made to appear that proper care was not used in the selection of its agents; and that by the exercise of proper care those agents would have been rejected as incompetent. The company is not a guarantor of competency or fitness in its employees.

Held, further, that the company was not responsible for the insufficiency of the bridge, in the absence of notice; unless the company was ignorant of its condition through its negligence or want of proper care.

THE plaintiff recovered \$5000 damages on the trial of this action at the Tioga circuit, in August, 1866. John C. Faulkner, the intestate, was an oilman and brakeman in the employ of the defendants, and while running on the defendants' road, was killed by the breaking down of a bridge of the defendants' over the Conhocton river, and the consequent fall of the car on which he was riding. The action is brought by his representatives, to recover damages for his death; and it is alleged that such death was caused by the negligence of the defendants in the care and maintenance of such bridge. The bridge was built in November, 1855, and broke down in May, 1865, from the effect of dry rot in some of its timbers. On the day before it broke it was examined by Gurmsey, who has charge of repairs on that division, and by Pratt, the division superintendent. They gave it a careful examination, applied the usual tests, watched the effect of a freight train passing over it while there, and pronounced it safe and sound. Evidence was given of the manner in which this bridge was built, and of the length of time bridges might safely stand without being rebuilt. There was no evidence of incompetency or want of skill on the part of Gurmsey or Pratt, or that the bridge was known to be defective before its fall. Evidence was given tending to show that a different mode of constructing this bridge would have made it stronger, but it was not shown to be a defective or unsafe bridge, in its original manner of construction.

The judge submitted to the jury two propositions, to which the defendant excepted:

1st. If the bridge broke down in consequence of any defect

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in its construction which could have been avoided by the exercise of ordinary care and skill, the plaintiffs are entitled to recover.

2d. If the bridge broke down in consequence of having been used, without being rebuilt, longer than it was generally understood by competent persons, having the care of railroad bridges, to be safe to use such bridges without rebuilding them, the plaintiffs are entitled to recover.

This is an appeal from an order of the special term, denying a new trial, and from the judgment entered against the defendants on such order.

H. Gray, for the defendant.

J. J. Taylor, for the plaintiff.

By the Court, BOARDMAN, J. There are certain legal propositions which the authorities cited by counsel sustain :

I. Ordinarily, the defendant is not liable for injuries to one of its employees occasioned by the negligence of another employee engaged in the same general business. Such employees on entering the service take upon themselves as an incident to the hiring, the ordinary risks and dangers arising therein, which includes the negligence or carelessness of their fellow servants. (*Farwell v. Bost. and Worc. R. R.* 4 Metc. 49. *Priestley v. Fowler*, 3 Mees. & Wells. 1. *Coon v. Syr. and Ut. R. R.* 5 N. Y. Rep. 492. *King v. Bost. and Worc. R. R.* 9 Cush. 112. *Gillshannon v. S. B. R. R. Co.*, 10 id. 228. *Albro v. Agawan Can. Co.*, 6 id. 75. *Hayes v. West. R. R.* 3 id. 270. *Wright v. N. Y. Cent. R. R.* 25 N. Y. Rep. 562. *Sherman v. R. and S. R. R. Co.*, 17 id. 153. *Russell v. Hudson Riv. R. R. Co.*, Id. 134. *Seaver v. Bost. and M. R. R.* 11 Gray, 466. *Tunney v. Midland R. R.* 1 Eng. Law R. C. P. 291. *Morgan v. Vale of Neith R. R.* 1 Q. B. 149. *Feltham v. England*, 2 id. 33.)

In addition to the general rule, these cases establish that

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no distinction arises from the different grades or ranks of the employees, nor from their being engaged in different kinds of work, provided the services tend to accomplish the same general purpose.

II. The defendant is, however, responsible for injuries to employees arising from its personal neglect, or from the want of ordinary care and precaution on the part of the master, in the selection of employees, appliances and machinery. (*Ryan v. Fowler*, 24 N. Y. Rep. 410. *Keegan v. West. R. R.* 8 N. Y. Rep. 175. *Marshall v. Stewart*, 33 Eng. L. and Eq. Rep. 1. *Patterson v. Wallace*, 28 id. 48. *Wright v. N. Y. Cent. Railroad*, 25 N. Y. Rep. 562. *Snow v. Housatonic Railroad Co.*, 8 Allen Mass. Rep. 441. *Gilman v. East. R. R. Co.* 10 id. 236. *Garby v. Harris*, 11 id. 112. 28 Vermont R. 59.)

I am satisfied by these cases, and by the law as therein laid down, that there was no negligence on the part of the defendant creating a liability for the damages suffered by the plaintiffs' intestate. This bridge was well built, of good sound materials, upon a plan in common use. The evidence as to its strength and capacity is abundant. There was, therefore, no original defect in its construction, constituting want of ordinary care, or negligence on the part of the defendants. This is true, or else the plaintiff is involved in the inconsistency of insisting upon a recovery on the ground that the bridge had stood so long under constant use, that the defendant was guilty of negligence in not rebuilding it. Both positions cannot be true. It could not have been so defective as to be dangerous, and yet stand so long as to become dangerous upon the presumption that it ought to be rebuilt by reason of its age. Besides, its destruction was in no sense due to any defect in its original construction, but to a process of natural decay, called dry rot. There is evidence showing that Gurmsey, who inspected this bridge the day before its destruction, had had charges of bridges since 1848, and was one of the best men on the road; that Pratt, the division

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superintendent, had been in the employ of the defendant since 1850, as track master and superintendent. No question as to the competency or fitness of these men for their respective duties, appears to have been raised upon the trial. The defendant is not, therefore, liable by reason of employing incompetent, unskillful or improper persons. The defendant is not a guarantor of competency or fitness in its employees. It must affirmatively be made to appear that proper care was not employed in the selection of these agents, and that by the exercise of proper care these agents would have been rejected as incompetent. Nor is the defendant responsible for the insufficiency of this bridge, in the absence of notice, unless the company was ignorant of its condition through its negligence or want of proper care. It is not claimed that the company had any notice which could charge it with knowledge, except the length of time the bridge had been standing. That was not an unusual time. Other bridges have been standing much longer. Every bridge must be judged by its exposure, its length of span, its materials, its means of protection. While time is an important element, the other considerations are equally important. All taken together, upon an examination, must have weight upon the necessity of a rebuilding of the bridge. Here, too, the skill and competency of the bridge builder is brought into action. His error of judgment is not the negligence of the company. The decision should be based upon a skillful examination by competent persons. The time cannot be fixed and limited by the verdict of a jury. Each case must be judged of by itself. The bridge had every appearance of being sound and safe; it was examined and tested and watched, under the weight of a train of cars, on the day before the accident happened, by the repairer of bridges and the superintendent of that division, and was deemed entirely sound and safe. I do not see what more could have been legally required of the company in the exercise of proper care than was done in this case. If this was negligence in the defendants then a latent defect in a steam boiler, a rotten

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plank in a ship, a flaw in an iron rail, an unknown weakness in a factory floor or wall, would charge the master with all the damages suffered by his employees in consequence. In the case of common carriers, the liability would be as broad in case of employees as passengers, for injuries resulting from accidents like the one in question. On the contrary, I am convinced they must either have notice of such defects, or else have neglected to use the ordinary care and skill which would have given knowledge. I am confirmed and supported in the conclusion to which I have come, by the opinion of Mr. Justice Marvin, in the case of *Lucy A. Warner, adx. v. The Erie Railway Co. (Mss.)* in an action for damages, in causing the death of the plaintiff's husband by the falling of this same bridge, and on this same occasion. The evidence, so far as it appears, was substantially the same, and the judge, by a very satisfactory process of reasoning, reaches the conclusion, that the complaint should be dismissed.

I think the defendant's motion for a nonsuit should have been granted; that the judgment and order appealed from should be reversed, and a new trial granted, costs to abide the event.

MASON, J. concurred.

BALCOM, J. dissented.

New trial granted.

[BROOME GENERAL TERM, July 9, 1867. *Mason, Balcom and Boardman, Justices.*]

LEWIS *vs.* THE NEW YORK CENTRAL RAILROAD COMPANY.

Under the Act of Congress, approved February 25, 1862, authorizing the issue of United States notes, and declaring that they shall "be lawful money and a legal tender for all *debts*, public and private, within the United States, except duties on imports, and interest," &c. a railroad company is bound to accept United States notes issued in pursuance of that act, at the value expressed on the face of them, in payment of fare upon its railroad, when demanded in advance of transportation on such road.

(If it exacts payment of the legal fare of a passenger, in advance, in gold or silver coin of the United States, or the market value of such coin, in United States notes, it will be guilty of extortion, and liable to the penalty imposed by the act of the legislature of March 27, 1857, for asking and receiving a greater rate of fare than that allowed by law.)

CASE agreed upon. The plaintiff claims judgment for the penalty of \$50, for the defendants asking and receiving a greater fare from him, on their railroad from Syracuse to Canastota, than they were authorized by law to demand and receive.

C. B. Sedgwick, for the plaintiff.

D. Pratt, for the defendants.

BALCOM, J. On the 7th day of May, 1867, the plaintiff applied at the office of the defendants, at the city of Syracuse, to purchase a ticket for passage on the defendants' railroad from that city to Canastota, in the county of Madison. The defendants asked and demanded of the plaintiff, for such a ticket and passage, the sum of forty-four cents in lawful coin of the United States, or fifty-five cents in paper currency. The plaintiff offered and tendered to the defendants forty-four cents in United States notes, in payment for such ticket and passage, which the defendants refused to receive; and thereupon the plaintiff paid, and the defendants received, for such passage and ticket, fifty-five cents in United States notes. The plaintiff handed to the defendants' agent a one dollar United States note, and such agent paid back

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to the plaintiff forty-five cents in fractional currency ; which was the way the plaintiff paid for such ticket and passage. The distance from Syracuse to Canastota is twenty-two miles. Chapter 76 of the laws of 1853, (*Laws of 1853*, p. 113, § 7,) requires the defendants to carry way passengers on their road at a rate not to exceed two cents per mile. And it is provided, by chapter 185 of the laws of 1857, (*Laws of 1857*, vol. 1, p. 432,) that "any railroad company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars ; which sum may be recovered, together with the excess so received, by the party paying the same." The act of congress, approved February 25, 1862, authorizing the issue of United States notes, declares that they shall "be lawful money and a legal tender for all debts, public and private, within the United States, except duties on imports and interest," &c. The Court of Appeals has settled the question, in this state, that this act is constitutional and valid. (27 *N. Y. Rep.* 400.) The only material question, therefore, for determination in this case, is whether the act of congress is broad enough to require the defendants to take United States notes in payment of fare on their road, when they demand and receive such fare in advance of transportation on their road. It is not disputed by the plaintiff's counsel that the defendants may refuse to carry any person in their passenger cars who will not pay the legal fare before he is carried any distance in their cars. It is claimed by the defendants' counsel that no *debt* is due from a passenger to the defendants, before he is carried any distance in their cars, and that as the act of congress only makes the notes of the United States a legal tender for all *debts*, the defendants may exact payment of fare of passengers in advance of their transportation, in gold or silver coin of the United States, or may require them to pay its market value in United States notes. Is such fare to be deemed and regarded a debt, within the meaning of the act of congress, when demanded of a passenger before he enters the defend-

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ants' cars to be carried from one station to another on their railroad? A MS. opinion of Mr. Justice GRIER of the Supreme Court of the United States, in *The Philadelphia and Reading Railroad Company v. Morrison and others*, favoring the position that such fare, when exacted in advance, is not a debt, within the meaning of the act of congress, has been presented to us for our consideration. That opinion was delivered in the United States Circuit Court for the Eastern District of Pennsylvania; and if there be no distinction in principle between the case in which it was delivered and this, it is not a controlling authority in this case. It is only entitled to the respect due to the opinion of an able and learned judge, upon a question somewhat similar to the one in this case. But I think there is a distinction between that case and this, though it is difficult to ascertain from the opinion in that case, the precise facts on which it was based. If, however, there be no material distinction in principle between the two cases, I am constrained to say, my opinion is, Mr. Justice Grier has put too narrow a construction upon the act of congress; and that according to the true meaning of that act the defendants are bound to accept United States notes, issued under such act, in payment of fare upon their railroad, when demanded in advance of transportation on such road. The defendants are common carriers of persons, and are therefore under a legal obligation to carry all persons who apply for passage on their railroad, and tender the legal fare. *Angell* says "there is an implied engagement on the part of public carriers of persons, not to refuse those who apply for seats by their conveyance, the privilege of traveling in such a manner, provided there is room for them, and a tender of, or offer to pay, the fare, is made at the time." (*Angell on Carriers*, 3d ed. § 524.) *Edwards* says the duties of a common carrier of persons "resemble those of the common carrier of goods; like him he has entered into an engagement with the public, and is bound to serve all who require his services." He also says,

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such a carrier of persons "has a right to demand prepayment of his hire, but is not at liberty to choose between those whom he will and will not receive." (*Edwards on Bailments*, 577.) The same doctrine is laid down in *Redfield on Railways*, 344, and it is undisputed elementary law. This case is the same, in principle, that it would be if the parties had previously made a special contract which bound the defendants to carry the plaintiff as a passenger in one of their cars, from Syracuse to Canastota, on being paid the legal fare between those places, viz: two cents per mile. If the parties had made such a contract, the fare between those places would have been a debt due from the plaintiff to the defendants, at the time the former applied at the office of the latter for a passage, and offered to pay for a ticket that would entitle him to ride in one of their cars from one of such places to the other; and in that case United States notes would have been a legal tender for such fare. Now, as the rights and obligations of the parties are placed on the same footing, by the law of the land, that they would have been by such a special contract as I have supposed, I am of the opinion the fare the plaintiff offered to pay the defendants, from Syracuse to Canastota, should be deemed a debt that was due from the former to the latter, within the meaning of the act of congress, at the time the offer was made to pay the same.

If these views are correct, the plaintiff had the right to pay his fare from Syracuse to Canastota in United States notes at the value expressed on the face of the same; and the defendants were guilty of extortion in exacting of him payment of such fare at a higher rate than two cents per mile, in such notes. The legal fare the defendants had the right to demand and receive of the plaintiff was forty-four cents, and they compelled him to pay them fifty-five cents in United States notes. The extortion, therefore, was eleven cents. For which eleven cents, and the penalty of fifty dol-

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lars, I am of opinion the plaintiff is entitled to a judgment, with the costs allowed in such a case by section 373 of the Code.

BOARDMAN, J. The franchise enjoyed by the defendant is derived from the state of New York. The incorporation partakes of all the essential features of a contract, in which the state gives the defendant certain valuable rights and privileges, in consideration whereof the defendant assumes certain duties and obligations to the public at large and for the public accommodation. The obligations are mutual; on the one hand not to injure or impair the franchise, on the other to pay or discharge the obligations it has incurred by the acceptance of the charter. Among these obligations is that which requires the defendant to carry passengers on its road at two cents a mile, under the penalty sought to be recovered in this case, for a refusal, as follows: "Said consolidated company shall carry way passengers on their road at a rate not exceeding two cents per mile." (*Laws of 1853, p. 113, § 7.*)

The defendant does not make the contract when the ticket is sold, or with the passenger. That was made with the state, for the benefit of the passenger, when the franchise with all its burdens was accepted and enjoyed. The duty to carry the passenger upon demand and upon payment of fare is absolute. It is very different from the case suggested on the argument, of a vendor of property fixing an alternative price—in gold or in currency. *He* is not bound to sell at *any* price, and may require any amount or kind of money or property he pleases, as a condition of parting with his property. If, however, he was under obligations to sell, and the price had been fixed at or below which he must sell, and the person to whom such sale must be made, the case would be analogous to the one under consideration. The passenger then by virtue of the contract between the state and the defendant has a positive right to be carried upon the road—it is due to him—the defendant owes it—it is a liability, a duty, an obligation, a

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debt from the defendant to each member of the body politic who applies and tenders the legal fare. True, the passenger may not be a party to the contract between the state and the defendant. But it is a contract under which he has acquired rights and is entitled to remedies in case of a refusal of them. The benefits due to him may be by him enforced. The state, too, may have remedies for a breach of such contracts. But they are independent of the individual's.

When, therefore, the passenger applies for his ticket and tenders his money he does not seek to make a contract, but rather to entitle himself to the benefit of an existing contract by the performance of a condition precedent—the payment of fare in advance. He is not seeking to acquire the right of passage, or to put the company under any obligation to him. They both existed, and he was entitled to both, at any and all times. The ticket purchased is not so much evidence of a contract to carry as of fare paid, by which he was entitled to be carried. If by its charter the defendant had agreed to carry a certain class free, no ticket would be required as evidence of the contract, but might be necessary to show the person holding it belonged to such class. The ticket is a mere receipt, showing payment of money. The time when the fare is paid does not affect the question. It may depend upon the contract, or upon rules or regulations deemed in law reasonable and proper. If paid upon the cars, it is sufficient; nor can the company say we decline to make a contract with you, you must get off. The contract is already made, and the company must accept the fare and discharge the liability which the law has imposed, irrespective of the time when the fare is paid.

This, then, being a contract between the state and the defendant for the benefit, among others, of passengers and which each passenger may enforce, it only remains to consider what must be tendered as performance of the condition precedent, to secure the right of passage.

Prior to the act of congress, approved February 25, 1862,

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it is clear that the defendant could have demanded current coin, or its equivalent. By that act United States notes were authorized to be and were issued, which were declared to be "lawful money and a legal tender in payment of all debts, public and private, within the United States," with exceptions not material to us now. The question is thus presented whether a tender of fare in such currency secured a right of passage, or whether the defendant had a right to demand current coin. It might perhaps be contended that the words "lawful money" might by themselves be treated as an equivalent for the words *legal tender* in the broadest and most comprehensive sense in which the latter words are ever used, but I have not examined that view of the case, and prefer to pass and submit another view quite satisfactory to me and equally conclusive.

The word "debts" in the act of 1862 is undoubtedly used in no narrow or restricted sense, but rather in a broad and general sense. It was essential that it should be, since the object of the law was to give as much support and vitality to these notes as possible. Let us see then what signification should be applied to the word. *Webster* defines debt: "That which is due from one person to another—whether money, goods or services; that which one person is bound to pay or perform to another." The *Encyc. Met.* as, "Any thing had or held of or from another, his property or right, his due; that which is owed to him, which ought at some time to be delivered or paid to him." *Bouv. Law Dic.* "In a still more enlarged sense it denotes any kind of a just demand." (See also *Newell v. The People*, 7 N. Y. Rep. 124.) Keeping in view, then, that a contract exists by which the defendant was bound to carry the plaintiff, upon his tendering the legal fare, such fare must be deemed a debt; that which one person is bound to pay to another to secure a right; that which is due, or owed, to the defendant, which ought at some time to be paid as a consideration for the passage; a just demand on the part of the defendant, if the plaintiff is or is

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to be carried. As we have seen, it makes no difference in the character of the obligation, whether the fare is paid before or after starting, or at the end of the route. The obligation to carry is always the same; the right of refusal never exists, provided payment is made when demanded. The payment is the consideration for which the railroad company discharges its obligation or debt to the passenger, as the payment of a mortgage entitles the mortgagor to have the same discharged. If a father should make a written contract with a livery keeper to carry any members of his family, who might apply, to a railroad station, whenever requested, at \$1 each, payable in advance, could the livery keeper lawfully refuse unless gold was tendered? I think no one would say that he could, but rather that this was money due under that contract—a debt, and was lawfully payable in legal tender notes. Yet the cases are parallel in all respects, except that one is a written contract, the other is the same kind of an obligation created by the act of incorporation and its acceptance by the defendant. I can see no ground for distinguishing between the two cases—no reason for applying a different rule. They are essentially one and the same.

The cases establishing the constitutionality of the law of 1862, are so numerous and familiar that I need only cite *Metropolitan Bank v. Van Dyck*, (27 N. Y. Rep. 400.)

For the reasons suggested, I am of opinion the defendant exacted from the plaintiff a greater amount than by law allowed, and that the plaintiff is entitled to judgment against the defendant for \$50, and costs, pursuant to the terms of the submission.

MASON, J. This case is submitted upon an agreed case, under section 37 of the Code, upon which the plaintiff claims to recover a penalty of \$50 of the defendants, for exacting and receiving from him as a way passenger on their railroad, more than two cents per mile as fare. By the 7th section of

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chapter 76 of the laws of 1853, it is declared that when any two or more railroad companies named in this act, are so consolidated, said consolidated company shall carry way passengers on their road at a rate not to exceed two cents per mile. (*Page 113.*) It is conceded that the defendants were consolidated, and fall within this section of the statute. By section 1 of chapter 185 of the laws of 1857, (*vol. 1, p. 423,*) it is declared that any railroad company which shall ask and receive a greater rate of fare than that allowed by law shall forfeit \$50, which sum may be recovered by law, together with the excess so received, by the party paying the same. (*Laws of 1857, vol. 1, p. 432, § 1.*) The facts in this case are simply these: the defendants exacted, and the plaintiff paid them fifty-five cents for his fare from Syracuse to Canastota, a distance of twenty-two miles, the plaintiff claiming that forty-four cents was all that they were entitled to. The plaintiff tendered them forty-four cents in United States notes, and the defendants required payment in coin or its equivalent in United States notes. The forty-four cents in coin was of more value than the fifty-five cents in United States notes, and if the defendants were entitled to require payment in coin or its equivalent, they, of course, are not liable in this action for the penalty, under the statute. When this statute of 1853 was passed, the only lawful money was coin or specie. But the plaintiff claims that as the act of congress, (*chap. 33 of the Laws of 1862,*) entitled "an act to authorize the printing of United States notes," &c. passed February 25th, 1862, makes those notes lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest upon government bonds and notes, the defendants are obliged to receive the same as lawful money at par, and cannot exact payment in specie, or coin, or its equivalent; and this brings us to the real question in the case, which is, have the defendants right to demand the payment of fares in specie or its equivalent in United States notes. The defendants

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are not, like a private individual, at liberty to carry persons who present themselves as passengers, or not, as they please. Being common carriers, the law imposes upon them the duty to receive and carry all persons who apply for that purpose, and tender the legal fare. This duty is imposed upon them by the common law. (*Angell on Carriers*, § 524. *Redfield on Railways*, 344. *Edwards on Bailm.* 577.) This duty is also imposed upon these companies by the 42d section of the general railroad act. (2 *R. S.* 687, § 42, 5th ed.) By this section it is declared that every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property, &c. and shall take, transport and discharge such passengers and property at and from and to such places, on the due payment of the freight or fare legally authorized therefor ; and the section then declares that the said corporation shall be liable to the party aggrieved, in an action for damages, for neglect or refusal in the premises. (2 *R. S.* 687, § 42, 5th ed.) The acceptance by the defendants of their franchise imposes upon them these obligations. The grant to these corporations of the powers and privileges conferred upon them, is to be deemed in law a sufficient consideration for an implied contract on the part of the corporation to perform the duties which the charter imposes, and the contract made with the sovereign power enures to the benefit of every individual interested in the performance. (*Wert v. The trustees of the village of Brockport*, 16 *N. Y. Rep.* 161.) There is, then, an implied contract resting upon the defendants to carry the plaintiff on the receipt of the fare. The terms of the contract are to carry the passenger on the due payment of the fare. Here, then is the whole case ; the passenger owes the railroad company the fare, which, by the terms of the contract as fixed in the statute, is to be paid in advance, while the corporation owes the duty to carry the passenger on such payment being

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made. The passenger owes this whenever he presents himself to purchase a ticket to secure a ride upon the railway, and it is no misnomer to call it a debt. The ordinary and legal acceptance of the term debt, imports a sum of money arising upon a contract, expressed or implied. (2 *Hill*, 223.) A debt, in its most general sense, is defined to be that which is due from one person to another, whether money, goods, or services ; that which one person is bound to pay or perform to another. (*Newell v. The People*, 3 *Seld.* 124.) It was said by this court, in *Kimpton v. Bronson*, (45 *Barb.* 625,) in considering the meaning of the word debt, as used in the act of congress above referred to, that it imports any obligation by contract, express or implied, which may be discharged by money, through the voluntary action of the party bound ; that whenever he may be at liberty to perform his obligation by the payment of a specific sum of money, the party owing the obligation is subject to what, in these statutes, is termed a debt. I am not able to see that it can make any difference with the case, if it were conceded that there was no such thing as an implied contract between the passenger and the carrier, but that the whole duties are imposed by the statute. The case would, in such case, stand thus : The statute says that these railroads shall furnish the necessary vehicles for the transportation of passengers, and shall take and transport such passengers on the due payment of the fare legally authorized therefor. (2 *R. S.* 687, § 42, 5th *ed.*) Now the passenger presents himself to be carried ; the railroad owes him the duty, under the statute, to carry him ; and when he demands that they shall do so, he owes them the fare, as the statute only imposes the duty on the railroad to carry him when the due payment of fare shall be made. He then owes the fare whenever he demands his ride, and must pay it in advance, and in this view it is quite safe to say he discharges that which he owes when he purchases a ticket, and pays for his ride in advance. In other words, he discharges his obligation, and pays money when he owes it ; or, if you please,

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pays a debt. If I am correct in my views, as expressed, it follows that the payment of fare by a passenger, in advance of his being carried, discharges a debt within the meaning of the act of congress which makes these United States notes a legal tender in discharge of all debts within the United States, with the exception above stated. It must be borne in mind that the defendants have received their franchise as common carriers from the legislative authority of the state, and are bound in law to conform to the requirements imposed upon them by the sovereign legislative power of the state. They also hold their franchise from a government over which the government of the United States has jurisdiction, and upon certain subjects, the exclusive sovereign power of legislation. The power to declare what shall be lawful money in the state, belongs to the congress of the United States exclusively, and it follows that the defendants hold all their corporate rights from the state, subject to the exercise of this power over them by the general government. If congress should pass an act, stamping all the coins of the United States with twice their present value, such would be their value, and the defendants would be obliged to receive them at such value, for they would be lawful money, and congress has the undoubted right to fix the value of our coins. Congress has the power and the legal right to make these United States notes, issued by the government of the United States, lawful money, and a legal tender in payment of all debts and obligations. This has been expressly decided by the highest judicial tribunals, both of the state and of the United States. (27 *N. Y. Rep.* 400. 34 *N. Y. Rep.* 649. 45 *Barb.* 579. 30 *How. Pr.* 387. 10 *Am. Law. Reg.* 553. 14 *id.* 95.) This the act of Congress, as we have already seen, has done. It has made these United States notes lawful money, and stamped them with a fixed value as such, and declared that they shall be a legal tender in payment of all debts within the United States, with an exception which does not affect the present case. If I am right in the views above expressed, it follows

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that the duty is imposed upon the defendants to receive them as such, and they have no right, as regards the passengers they carry, to refuse them, and demand payment in specie or its equivalent. The defendants being bound to carry their way passengers for two cents per mile, and congress having made these United States notes lawful money, and declared that they shall be a lawful tender, &c. it follows that the defendants rendered themselves liable for the penalty of \$50 imposed by the statute, and I advise that a judgment be entered in favor of the plaintiff for the penalty of \$50, and eleven cents, the excess paid by the plaintiff.

Judgment for the plaintiff.

[BROOME GENERAL TERM, July 9, 1867. *Mason, Balcom and Boardman*, Justices.]

HANNAH vs. MCKELLIP.

A judge, at the trial, may permit counsel to ask a party examined as a witness, on his cross-examination, if he has not sworn falsely in a particular suit, or on some specified occasion; for that would be an act of himself which, if he admitted, he might possibly explain. But a judge has not the discretion to permit the other party to affect the credit of the witness, as such, by proof by him, on his cross-examination, that third persons have accused him of swearing falsely; that being mere hearsay evidence, and not proof of acts or declarations of the witness for which he is personally responsible.

Where a witness' character for truth and veracity is attacked by asking him, on cross-examination whether third persons have not accused him of swearing falsely, evidence to show that his general character for truth and integrity is, and always has been good, is not admissible.

The fact that the witness has not sued such third persons for slander will not make the specific slanderous accusations made by them admissible to affect his credit.

ACTION on two promissory notes. Defense, payment. The action was tried at the Otsego circuit in June, 1866, when the jury rendered a verdict in favor of the plaintiff for the full amount of the notes, \$346.55.

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The defendant moved for a new trial on a case and exceptions.

D. C. Bates, for the plaintiff.

James E. Dewey, for the defendant.

By the Court, BALCOM, J. The defendant was a witness in his own behalf, and testified that the notes were paid to the plaintiff within a short time after they were given. On his cross-examination the plaintiff's counsel asked him this question: "Have you ever been charged with swearing falsely?" Which was objected to by the defendant's counsel, on the grounds that it was not a proper method of affecting a witness' credibility; that it was not calling for any act of the witness affecting his credit, or admissible to impeach his character, and was irrelevant and incompetent. The objection was overruled, and the defendant's counsel excepted. The defendant answered: "I suppose I have, by some certain individuals." The plaintiff's counsel then asked the defendant this other question: "Was you charged in relation to what you testified to where you were a party, yourself, with swearing falsely?" To which question there was the same objection, ruling and exception as there had been respecting the previous question. The defendant answered: "I suppose I have, by hearsay." He subsequently said, he might have been so charged to his face, and thought he had been so charged to his face, by some certain persons. In answer to a question put by the plaintiff's counsel, he stated that he never sued any person for accusing him of swearing falsely. The defendant offered to call witnesses to show that his general character for truth and veracity and for honesty and integrity was, and always had been, good. His counsel claimed that such evidence was admissible by reason of the questions put to him and answered by him on his cross-examination, as to his having been charged with false swearing.

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The plaintiff objected to the evidence so offered, as immaterial; which objection was sustained, and the defendant's counsel excepted to the decision.

The defendant's offer to show that his general character then was, and always had been good, was properly rejected. Justice JOHNSON said, in delivering the opinion of the court in *Frost v. McCargar*, (29 Barb. 617,) "We think the settled rule in this state now is, that where the veracity of a witness is attacked, and he is sought to be impeached only by proof of contradictory statements made by him on other occasions, in respect to the same matter, or by proof of particular facts stated by such witness against himself on his examination, evidence of general good character, or of good character for truth and veracity, in support of the witness, is incompetent." And the authorities cited in that opinion fully sustain the above proposition.

The rule is now established that the judge before whom a cause is tried, in the exercise of his discretion, may admit or exclude disparaging questions, not relevant to the issue, on the cross-examination of a witness, when put for the purpose of impairing his general credit. (*See The President etc. v. Loomis*, 32 N. Y. Rep. 127.) But this rule does not authorize the judge to allow a witness to be cross-examined as to whether specific disparaging declarations have been made against him by third persons. Such declarations, though made directly to the witness, are mere hearsay evidence, and if permitted to be proved by a witness, they may affect his credit with the jury notwithstanding his assertion that they were false. When the credit of a witness is assailed by proof of this character, by other witnesses, the examination of the impeaching witnesses must be confined to his general reputation. (1 *Greenl. Ev.* § 461. *Newcomb v. Griswold*, 24 N. Y. Rep. 298.) It is not enough, that they profess merely to state what they have heard others say; for those others may be but few. They must be able to state what is generally said of him, by those among whom he

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dwells, or with whom he is chiefly conversant ; for it is this only, that constitutes his general reputation, or character. (*Id.*) The judge might have permitted the plaintiff's counsel to ask the defendant, on his cross-examination, if he had not sworn falsely in a particular suit, or on some occasion ; for that would have been an act of himself, which, if he had admitted, he might possibly have explained. But he had not the discretion to permit the plaintiff's counsel to affect the defendant's credit as a witness, by proof by him, on his cross-examination, that third persons had accused him of swearing falsely ; for that was mere hearsay evidence, and not proof of acts or declarations of the witness for which he was personally responsible. The specific slanderous accusations of those persons were not rendered admissible to affect his credit, because he had not sued those persons for slander. His motives for not suing them were not a proper subject of inquiry, and they may have been laudable.

It is unnecessary to examine any other question presented by the exceptions in the case ; for there must be a new trial granted in the action, in consequence of the erroneous ruling of the judge which allowed the plaintiff's counsel to prove on the cross-examination of the defendant that third persons had accused him of swearing falsely.

New trial granted, costs to abide the event. .

[BROOME GENERAL TERM, July 9, 1867. *Mason, Balcom and Boardman, Justices.*]

JOSEPH BRAND vs. EDMOND BRAND and ALLEN BRAND.

On settling and arranging a partnership loss between the parties, the sum of \$35 was found due from the plaintiff to the defendants. It was, thereupon, mutually agreed between them, *by parol*, that this sum should be *applied* upon a demand the plaintiff had against the defendants, and the demand *cancelled*. Nothing beyond mere words passed between the parties, and although a receipt for the plaintiff's demand was to be given, none was ever executed. *Held*, that the agreement was void by the statute of frauds. (INGALLS, J. dissented.)

An application of one demand to the payment or extinguishment of another, not proved by any act of the parties, cannot be claimed as legally flowing from a parol agreement that such application shall be made.

The case of *Davis v. Spencer*, (24 N. Y. Rep. 386,) commented on, and distinguished.

APPEAL from a judgment entered on the report of a referee. The plaintiff and defendants, with seven others, were heirs of Samuel Brand and Mary Brand, late of Durham, Greene county, deceased. Mary Brand survived her husband, Samuel Brand. And the sum of \$766.66 was set apart, and the interest thereon was to be paid to the said Mary Brand annually, during her life, (which was called her dower right,) and said principal sum, at her decease, was to be divided equally among said ten heirs. The defendants entered into an agreement with the said Mary Brand, August 16, 1843, to receive this money, to pay her the interest during her life, and then to distribute said principal sum of \$766.66 equally among said heirs. Mary Brand died April 9, 1848, and this action was commenced about sixteen years afterwards, to wit, January 22, 1864, to recover the one tenth of the principal sum of \$766.66, with interest from April 9, 1848.

The defendants, among other things, in their answer, set up payment and satisfaction, and the proof tended to establish the following facts: The defendant, Edmund Brand, had received this \$766.66, and was liable therefor. In the fall of 1847, he and the plaintiff were in partnership in buying and selling stock. The funds for that purpose were furnished, principally, by Edmund Brand. Each was to have one half

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the profits, and share one half the loss. They sustained a loss of some \$210, and the plaintiff, as the evidence shows, had used, for his individual benefit, some \$35 of the company funds. Soon after the death of Mrs. Brand, and in May, 1848, the plaintiff and Edmund Brand, in arranging and settling their partnership loss, and the plaintiff's share of this dower right, mutually agreed to apply this claim of the plaintiff upon said demand of Edmund Brand, and to cancel the same. This agreement was by parol, and was duly objected to, and excepted to, on the part of the plaintiff.

The referee found the facts to be as claimed by the defendants, and that the plaintiff's claim had not been paid or satisfied, otherwise than by the parol agreement above mentioned. He found, as a conclusion of law, that the plaintiff's cause of action was thereby satisfied and discharged, and ordered judgment for the defendants. Judgment being entered accordingly, with costs, the plaintiff appealed.

Lyman Tremain and *Lawrence Falk*, for the appellant.

Olney & King, for the respondents.

HOGEBROOM, J. I feel some embarrassment as to the proper disposition of this case. According to the finding of the referee, the plaintiff was indebted to one of the defendants in a sum equal to, or exceeding, the amount owing by the defendants to the plaintiff, and it was mutually agreed, *by parol*, that the amount due to the plaintiff should be set off and applied upon the demand which the defendant, Edmund Brand, had against the plaintiff, and that by such set off and application, the claim of the plaintiff against the defendants was to be *canceled*. He further finds, that the plaintiff's claim has not been paid or satisfied, otherwise than by the parol agreement aforesaid.

No writing was made between the parties, although, according to the testimony on the part of the defendants, a

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receipt for the plaintiff's demand was to be given by the plaintiff, which was never done. Indeed, nothing beyond mere words passed between the parties, and the written memorandum, or receipt, which was contemplated, was never in fact executed.

I have great doubts whether this is sufficient to satisfy the requirements of the statute of frauds. According to the spirit of all the decisions, this was a contract for the transfer, or sale, by the plaintiff to the defendants, of the chose in action which represented the plaintiff's demand. There was no note or memorandum in writing, and never has been. There was no acceptance and receipt of the evidences of the thing in action. The only question is, did the buyer, at the time, pay some part of the purchase money? (2 R. S. 136.)

In *Artcher v. Zeh*, (5 Hill, 205,) Justice Cowen, delivering the opinion of the court, says: "Here every thing lies in parol; and even if there had been the express agreement which is set up—an agreement for absolute credit—I should doubt whether the statute would be satisfied without something more, at least some *absolute indorsement or written credit*, at the time. One object of the statute was to prevent perjury. The method taken was to have *something done*, not to rest every thing upon mere *oral agreement*."

In *Shindler v. Houston*, (1 Comst. 263,) Judge Gardiner says: "The object of the statute was not only to guard against the dishonesty of parties, and the perjuries of witnesses, but against the misunderstanding and mistakes of honest men." And at page 264: "The acts of part payment, of delivery and acceptance, mentioned in the statute, are something *over and beyond* the agreement of which they are a part performance, and which they assume as already existing." And at page 260: "This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done *subsequent to the sale*, unequivocally indicating the mutual intentions of the parties. *Mere words* are not sufficient."

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Bronson, J. says, at page 266 : " As was justly remarked by the defendant's counsel, there was nothing but *mere words*, and the statute plainly requires something more—it calls for acts."

Wright, J. says, at page 273 : " Whilst this meritorious law is in the statute book, it is our business to enforce it in good faith, and according to its plain letter and spirit, without studying to fritter away its vitality in the attempt to uphold contracts which, by its provisions, are clearly void."

In *Ely v. Ormsby*, (12 Barb. 570,) the plaintiff sought to recover the value of a *span of horses*, which had been levied upon by the defendant by virtue of an attachment against one Salisbury. The plaintiff made title to the horses through Salisbury, from whom he purchased them by parol. The plaintiff had a personal mortgage against Salisbury for \$500, covering the horses. The case states : " The plaintiff bought the horses at the sum of \$300, which amount was *applied on the mortgage*, though not indorsed, the mortgage being on file." A verdict and judgment passed for the plaintiff, which, on appeal, were reversed, the court holding, (according to the head note,) that " an agreement to indorse the amount of the property upon a personal mortgage held by the purchaser against the vendor, without any indorsement being in fact made, does not constitute payment."

These cases lean strongly against the position of the defendants in this case, and against the conclusion to which the referee arrived. The embarrassment I have felt arises from the case of *Davis v. Spencer*, (24 N. Y. Rep. 386,) to which we have been referred, and which seems, by the opinion of the court, to justify the proposition laid down in the head note, to wit : " An agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such maker and his partner, in payment of the note, operates *in presenti* as *satisfaction* of the note, *pro tanto*." But the question of the

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statute of frauds was not considered, and does not appear to have arisen. There is nothing to show that the agreement was not in writing, and the point involved was, whether an agreement to *apply* imported a *present* application and payment, and it was held that it did. It *assumes* that the agreement to apply was established by proper evidence, which is the precise question in dispute in the case at bar. In the present case, the application or *payment* is not proved by any act of the parties, and certainly by none subsequent to or independent of the contract itself, but is merely claimed legally to flow from the terms of the contract. In my opinion, this is not sufficient.

My conclusion on this point is strengthened by the subsequent case of *Brabin v. Hyde*, (32 *N. Y. Rep.* 519.) The action was brought to recover the possession, or value, of a mare and colt, and the question arose whether the defendant's purchase from Blackmer, a former owner, (under whom the plaintiff also claimed, by a subsequent purchase,) was good within the statute of frauds. The purchase was by parol, for \$175, for which he was to give Blackmer credit on his books, (Blackmer owing him for a store debt.) Such credit, or entry, appears to have been made upon a *blank leaf* (not in the regular account) of one of the books. There was no actual delivery of the mare and colt, and Blackmer subsequently sold them to the plaintiff. The Court of Appeals held the sale to the defendant invalid within the statute, and in their opinion, delivered by Brown, J. expressed themselves as follows, at page 523: "The payment may be made in money or property, or in the discharge of an existing debt, in whole or in part, due from the vendor to the purchaser, or the extinguishment of, or payment upon, a promissory note held by the latter against the former. A new agreement to apply the purchase money to either of these objects, would not be enough, because the contract would rest in *words, and nothing more.*"

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The agreement to pay the note, or satisfy the debt, must be consummated and carried into effect by an act which shall enforce the contract of sale. The note should be delivered up and canceled; or if the purchase money falls short of complete payment, it should be extinguished by an *indorsement* made upon it, in writing, which shall operate effectually as an extinguishment *pro tanto*, and if the purchase money is to be applied to pay an open account, in whole or in part, the creditor and purchaser should part with some written evidence of such application, which shall bind him, and put it into the power of his debtor and vendee to enforce the contract. Without this, or *something like this*, the contract is a mere collection of words, and the statute evaded."

On the whole, I am of opinion that the referee erred, and that the judgment must be reversed, and a new trial granted, with costs to abide the event.

MILLER, J. concurred.

INGALLS, J. dissented.

New trial granted.

[ALBANY GENERAL TERM, September 17, 1866. *Miller, Ingalls and Hogaboom, Justices.*]

THE PEOPLE, *ex rel.* Bean, *vs.* RUSSELL.

The fact that a tenant, against whom summary proceedings are instituted by the landlord, to recover possession of the premises, has a good defense to the proceedings, will not entitle him to a writ of prohibition to restrain the magistrate from entertaining the proceedings.

Although it be plain that the magistrate cannot, in conformity with law, decide in favor of the landlord, he is not thereby deprived of jurisdiction over the proceedings.

If the judge has jurisdiction of that class of proceedings, he cannot be prohibited from adjudging upon the question of the termination or expiration of the term. It cannot be assumed that he will pronounce an erroneous

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judgment. On the contrary, the presumption of law is, that he will decide correctly.

The tenant must await the decision ; and if it be erroneous, he has his remedy by *certiorari*, or an action for damages.

MOTION for a writ of prohibition, to restrain the defendant, as city judge of the city of New York, from entertaining summary proceedings under the statute, instituted by a landlord against a tenant, to recover the possession of leased premises.

LEONARD, J. It is entirely clear that there is no condition or limitation to the grant of the term. The term granted is one year. It is well settled that a condition contained in the covenants of a lease, and not embraced in the term named in the grant, does not affect the continuance of the term ; but the landlord must, in such case, resort to his action for damages against the tenant, on a breach of his agreement.

But, conceding these positions taken by the counsel for the relator, it does not follow that she is entitled to the writ of prohibition. Although it is plain that the city judge cannot, in conformity with law, decide in favor of the landlord, he is not thereby deprived of jurisdiction over the proceedings. The question of jurisdiction is settled by the nature of the proceeding, and not by the terms of the contract. The proceeding is by the landlord, for the summary ejectment of a tenant holding over, as it is alleged, after the termination of the term. The city judge has jurisdiction to hear that class of proceedings. The claim of the landlord being denied, he is to try the question. The fact that the term has not expired, does not appear until the tenant has produced her lease in evidence. It is sought to prohibit the city judge from adjudging upon the question of the termination or expiration of the term. It cannot be assumed that the city judge will pronounce an erroneous judgment. The presumption of law is that he will decide correctly.

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The tenant must, I think, wait for the decision ; and, if erroneous, she has her remedy, by *certiorari*, to procure a reversal ; and also an action for damages, if she should be illegally dispossessed.

The application is denied, with costs.

[NEW YORK SPECIAL TERM, February 4, 1867. *Leonard*, Justice.]

GOODSELL *vs.* PHILLIPS.

A party cannot enter a judgment upon an award in his favor, unless the submission, pursuant to which it was made, be in conformity with the statute respecting arbitrations. Nor can any judgment be entered on an award, under the statute, until the *submission* be proved by the affidavit of a subscribing witness thereto.

If there is no subscribing witness to the submission, so that the plaintiff cannot comply with the requirement of the statute, he is not entitled to a judgment upon the award.

And if the plaintiff applies for judgment upon the award without notice to the defendant, the latter will not waive the objection that the submission was not proved by the affidavit of a subscribing witness, by not opposing such application.

Nor will he waive the objection by taking part in the proceedings before the arbitrators, knowing that there is no subscribing witness to the submission ; nor by omitting to move to vacate, modify or correct the award.

APPEAL by the plaintiff from an order made at the Broome special term, in October, 1866, setting aside a judgment entered in his favor, against the defendant, and the execution issued thereon.

The judgment in question, was entered on an award of arbitrators for \$176.79, besides interest and costs, dated February 13, 1866. The submission of the matters in dispute between the parties to arbitrators was dated January 26, 1866. It was signed and sealed by the parties, and a five cent revenue stamp affixed thereto, but there was no sub-

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scribing witness. Two arbitrators were named in the submission, and it was provided therein that the party in whose favor an award should be made might enter a judgment against the other, as of the Supreme Court, the same as upon the report of a referee, with like costs to be taxed ; and the arbitrators were required to make their decision in writing, within ten days after the submission to them. The submission also contained provisions for the appointment of a third arbitrator, and for proceedings to be had thereafter, in case the two named in the submission should not agree.

At a special term of the court, held June 19, 1866, the plaintiff Goodsell, upon proof of the execution of the submission by the parties, and proof of the making and service of an award, and that a term of court had been held since the date of the publication of the award, at which the defendant could have made application, upon notice to the plaintiff, to vacate, modify or correct the award, in case he intended so to do, obtained an order, without notice to the defendant, for judgment against the latter upon the award ; and in pursuance of such order the plaintiff entered the judgment in question. This judgment the defendant afterwards moved to set aside, which motion was granted, and the plaintiff now appealed.

J. J. Van Allen, for the motion.

J. McGuire, opposed.

By the Court, BALCOM, J. The plaintiff was not entitled to enter a judgment against the defendant, upon the award, unless the statute authorized him to do it. A party can confess a judgment, which may be entered without action, provided he complies with the provisions of the Code of Procedure on the subject. (*See Code*, §§ 382 to 384.) A party cannot enter a judgment upon an award in his favor, unless the submission, pursuant to which it was made, be in con-

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formity with the statute respecting arbitrations. When parties, by an instrument in writing, submit matters in dispute to the decision of arbitrators, they "may, in such submission, agree that a judgment of any court of law and of record, to be designated in such instrument, shall be rendered upon the award made pursuant to such submission." (3 R. S. 5th ed. 855, § 1.) But to entitle any award to be enforced by the entry of judgment thereon pursuant to the statutes on the subject, it must be in writing, subscribed by the arbitrators making the same, and attested by a subscribing witness. (*Id.* 856, § 8.) And no judgment can be entered on such award, under the statute, until the *submission*, pursuant to which it was made, be proved "by the affidavit of a subscribing witness thereto." (*Id.* 856, § 9.) The statute is, "upon such submission being proved by the affidavit of a subscribing witness thereto, and upon the award made in pursuance thereof being proved in like manner, or by the affidavit of the arbitrators, within one year after the making of the same, the court designated in such submission shall, by rule in open court, confirm such award, unless the same be vacated or modified, or a decision thereon be postponed, as herein provided." (*Id.* § 9.) "Upon such award being confirmed or modified, the court shall render judgment in favor of the party to whom any sum of money or damages shall have been awarded, that he recover the same," &c. (*Id.* 857, § 14.) The submission in this case was not proved by the affidavit of a subscribing witness thereto; for there was no subscribing witness to it. The plaintiff could not comply with the statute respecting the proof of the submission, and did therefore not make a case that authorized the court to give him a judgment upon the award. The rule is, that the requirements of the statute must be strictly complied with, to entitle a party to enter a judgment on an award without action. (*Hollenbeck v. Fleming*, 6 Hill, 303.)

But it is claimed, by the plaintiff's counsel, that the defendant waived proof of the submission by the affidavit of a

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subscribing witness, by taking part in the proceedings before the two arbitrators named in the submission, knowing there was no subscribing witness to it ; and by not moving to vacate, modify or correct the award, as he might have done. This position is untenable ; for an award might have been made, under the submission, that could have been enforced by action ; and the defendant may have omitted to make such a motion under the belief that the award was valid, though no judgment could be recovered on it except by action. If he had had notice of the application for judgment upon the award, and had failed to object to a judgment being rendered on it, against him, on the ground that there was no subscribing witness to the submission, &c. it is probable he would have waived that objection, so that a judgment against him could not have been reversed. (*See Hollenbeck v. Fleming, supra.*) But he did not have any notice of the application to the court for judgment on the award, and therefore did not waive the objection that the submission was not proved by the affidavit of a subscribing witness thereto, by not opposing such application.

The plaintiff's counsel relies on the decisions in 12 *Wendell*, 212, and in *Hughes v. Bywater*, (4 *Hill*, 551,) as sustaining the regularity of the judgment in this case. But those decisions were made when judgments could be entered on warrants of attorney, without special motion, and the stipulations in the submissions, in those cases, were held to be the same thing as if they had expressly authorized the entry of judgment by attorney. Now, judgments cannot be entered on warrants of attorney, but must be entered in the manner prescribed by the Code, or by some other statute, unless entered in actions which have been duly commenced.

Our conclusion is that the judgment in this case was irregularly entered, for the reason that the submission was not proved in the manner prescribed by statute ; and that the defendant could move to have it set aside for irregularity,

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because he did not have any notice of the plaintiff's application for judgment on the award. It is, therefore, unnecessary to decide the other questions raised by the defendant's counsel, as to the invalidity of the award, because the appointment of the third arbitrator was not in writing, and because the award was made after the defendant's notice of revocation of the powers of the arbitrators, without giving him an opportunity to be heard before such third arbitrator, and we will not determine whether the defendant should have moved to vacate the award on those grounds, or whether he could move to set aside the judgment on those grounds, after omitting to move to vacate the award. It is sufficient for us to say, the judgment was properly set aside on the ground that the submission was not proved in the manner prescribed by statute. The order setting aside the judgment, and the execution issued thereon, should be affirmed, with costs.

Order affirmed.

[BROOME GENERAL TERM, May 28, 1867. *Mason, Balcom and Boardman*, Justices.]

JOHN LOTHER FABER *vs.* JOHN H. FABER and J. S.
FRANKENTHAL.

A manufacturer has a right to put or stamp his own name on the articles manufactured by him, and on the bands, wrappers or covers, in which they are put up; and any injury which another manufacturer, of the same surname, may suffer thereby, must be viewed as an injury without a remedy.

A manufacturer of lead pencils has no right to the exclusive use of a particular colored paper, or kind of paper, for covering or inclosing his pencils, by the grooves in a book form, or any other particular form.

MOTION to continue an injunction. The action was brought by John Lother Faber, the manufacturer of the article known as the "A. W. Faber" lead pencil, against

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John H. Faber, and his agent in this country, J. S. Frankenthal, for an injunction, and damages for violation of the trade mark claimed by the plaintiff.

The plaintiff resides and carries on the manufacture of pencils at Stein, and the defendant J. H. Faber, at Schweinaw ; both of which places are near Nuremberg, Germany. At and near Nuremberg are many other similar manufacturers of lead pencils.

For the defense, it was contended that the plaintiff had no trade mark in the name "Faber ;" and that the method and style in which the pencils were manufactured and put up, the kind of wrappers, labels, &c. used, were not peculiar to the plaintiff, but were such as were generally employed by the manufacturers at Nuremberg.

George DeForest Lord, for the motion.

C. A. Runker, opposed.

SUTHERLAND, J. It is unfortunate for the plaintiff that he and the defendant J. H. Faber, are both manufacturers of lead pencils, at and near the same place in Germany, and that both have the same name, Faber ; for it is easy to see that this circumstance may have been, and may be, an injury to the plaintiff ; but the defendant, Faber, has a right to put or stamp his own name in gold, gilt or other letters, on his pencils, and on the bands, wrappers or covers in which they are put up, as described in the complaint. And any injury which the plaintiff has suffered, or may suffer, by such use of the defendant Faber's name merely, must be viewed as an injury without a remedy.

The plaintiff certainly cannot claim the exclusive right to manufacture lead pencils for the American market, or the exclusive right to make them round, and to cover or polish them with black varnish, or stamp gilt or gold numerals upon them, to designate certain qualities.

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It is plain to me that the plaintiff has no right to complain of the form or finish of the defendant J. H. Faber's pencils, or of any mark or stamp upon them, viewed singly, and out of their market bands or enclosures. There is nothing but the name of the maker stamped upon the pencils, viewed singly, calculated to deceive the purchaser of a single pencil, or of any number less than a dozen ; and the maker had the right to put his own name on his own pencils.

Nor can I see upon what ground the plaintiff can complain of the manner in which the defendant Faber's pencils are put up for the wholesale market. The plaintiff certainly has no right to the exclusive use of a particular colored paper, or kind of paper, for covering or inclosing his pencils by the gross in a book form, or any other particular form. The defendant Faber has the right to put his name on the paper envelopes or wrappers of his gross packages ; and considering how conspicuous his name is on these envelopes or wrappers, I cannot see how any wholesale purchaser, knowing that the plaintiff Faber, and the defendant Faber, both manufactured pencils, would be likely to be deceived by the gross envelopes or wrappers, and purchase the defendant's pencils by the gross for the plaintiff's ; especially as it appears from the defendant Frankenthal's answer and affidavit that all the manufacturers of lead pencils at Nuremberg, to the number of twenty or more, put up their pencils by the dozen and by the gross in substantially the same manner, using substantially the same color and kind of paper for the bands and for the outside gross envelopes or wrappers, with substantially the same devices, numerals and words, (with the exception of maker's name,) stamped or imprinted on them. As to the bands or wrappers of black glazed paper in which the dozen and the ten dozen are inclosed or wrapped, before the gross are put up in the book form ; considering the explanations of the answer, and affidavit of the defendant Frankenthal, as to the universal use by pencil manufacturers of the words "Crayons Polygrades" and "Pour

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Dessiri, Architecture Bureau," &c., &c. on such bands or wrappers, I cannot see how the plaintiff can complain of their use by the defendant Faber. Besides, these words, and the gilt parallelogram and ornamental work, device, or design surrounding them, and the maker's name, cannot deceive or mislead any purchasers by the dozen packages or bundles, and I can hardly think, considering the conspicuous manner in which the maker's name is put in gold or gilt letters on these bands, that they are likely to deceive any such purchasers who know that there are two "Fabers" who manufacture pencils.

I would remark, too, that it would have been better for the plaintiff to have resorted to the courts of his own country to protect his rights, whatever they may be.

Upon the whole, I am of the opinion that the motion to continue the temporary injunction should be denied, and that the temporary injunction which was granted should be dismissed, with \$10 costs to the defendant Frankenthal, to abide the event of the action.

[NEW YORK SPECIAL TERM, June 8, 1867. *Sutherland*, Justice.]

Hoy *vs.* SMITH and others.

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A right of action, for wrongfully and without permission, raising ores and minerals from lands situate in another state, belonging to another person, and selling and converting them, is assignable, and may be prosecuted in the courts of this state, by one to whom the owner has assigned such ores and minerals and all claim for their wrongful conversion.

A PPEAL from an order overruling a demurrer to the complaint, with costs, &c.

C. O'Connor and *B. F. Deming*, for the appellants.

Wm. F. Allen and *J. H. Platt*, for the respondent.

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By the Court, LEONARD, P. J. The complaint states that the defendants wrongfully, and without permission from the owner, entered into the possession of certain lands, in Colorado, at a period before the plaintiff acquired the title, and before the cause of action accrued, and have ever since retained the possession. That during that period, the defendants raised ores and minerals from the land, which they have sold and converted to their own use, and have received a large sum of money for them. That the person who then owned the land has conveyed it to the plaintiff, and has sold and assigned to him the ores and minerals raised, carried away and converted by the defendants, and all claim by reason of their said wrongful acts.

The demurrer states two grounds of objection. 1st. That the land being out of the state of New York, this court has no jurisdiction over injuries committed to it. 2d. That the action will not lie until the plaintiff has recovered possession of the land.

The principles of law suggested by the demurrer may be conceded. It is, no doubt, true that no action will lie by the true owner against a person holding by adverse possession, to recover rent, or for injuries to the freehold, until he has recovered the possession.

But there is no adverse possession appearing here. It does not appear that the defendants have any sort of right to the land, or claim of title. They are trespassers upon the land, merely. The action is not for an injury to the freehold, but to recover the value of the ores after they had been separated from the land. After the ores had become personal property, the defendants converted them wrongfully, and received therefor a large sum of money. No complaint is made respecting the title, or stating an injury to the freehold. Such facts only are stated as tend to show the ownership of the ores and minerals. It is alleged that the defendants wrongfully raised them from the land belonging to another person, who has assigned them, and all claim for their wrongful

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conversion. That is the substance of the complaint. The pleader has stated the evidence to prove the ownership of the ores, instead of the fact. Such a right of action is assignable, and may be prosecuted in the courts of this state. The possession of the land has nothing to do with the question before us.

The order appealed from should be affirmed, with costs, with leave to the defendants to answer in twenty days, on payment of the costs of the demurrer and of the appeal, to be adjusted by the clerk.

[NEW YORK GENERAL TERM, January 7, 1867. *Leonard, Clerks and Ingraham, Justices.*]

 SERMONT vs. BAETJER and others.

A referee is not required to find upon any other facts than those which enter into and form the basis of the judgment to be entered upon his report. He is not required to negative, in express terms, any other facts. Facts not found are necessarily negatived by implication.

Where, in an action upon a charter-party, the answer set up as a defense that the plaintiff induced the defendants to enter into the agreement by representing that the vessel would carry at least 480 tons of such cargo as the defendants desired to ship, which representation was false and fraudulent; and the referee found that the parties executed the charter-party set out in the complaint, and that no false or fraudulent representations were made by the plaintiff, or his agent, to the defendants, or either of them, with respect to the vessel chartered, for the purpose of inducing them to enter into said agreement, or for any purpose; *Held* that the finding was sufficient.

A finding that the parties executed the charter-party set out in the complaint, and that the plaintiff fully performed all the conditions of his agreement, is sufficiently explicit in respect to the plaintiff's performance. It is not necessary to find in what manner he performed, or what particular acts he did by way of performance.

APPEAL from a judgment entered on the report of a referee. Action on a charter-party executed in duplicate by the plaintiff and defendants respectively, in the city of New York, dated the 15th of August, 1862, whereby the

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defendants chartered the French ship "Belle Anais," of which the plaintiff was master, for a voyage from New York to Havre with a cargo of assorted merchandise, for the sum of 25,000 francs payable in cash in Havre on the arrival of the vessel at that port. The charter-party recited that the vessel was of 404 tons register. The complaint alleged the execution of the charter-party, performance of its requirements by the plaintiff, and the defendants' refusal to pay according to its terms. The answer set up first, that the plaintiff refused to allow the vessel to be fully loaded, or to receive on board all the cargo which the defendants offered to put on board, and which by the terms of the agreement he was bound to take, and secondly, that the plaintiff induced the defendants to enter into the agreement by representing to them that the vessel would carry at least 480 tons of such cargo as the defendants desired to ship, which representation was false and fraudulent. The referee found that the parties executed the charter-party set out in the complaint; that no false or fraudulent representations were made by the plaintiff or his agent to the defendants or either of them in respect to the vessel chartered, for the purpose of inducing them to enter into said agreement, or for any purpose; that the plaintiff fully performed all the conditions of his said agreement and did every thing that he was bound to do thereunder; and that the sum of \$923.52 was due the plaintiff on the 4th of September, 1862, and was unpaid, for which sum, with interest, he reported the plaintiff was entitled to judgment.

W. Benedict, for the appellants.

F. R. Coudert, for the respondent.

By the Court, JAMES C. SMITH, J. There is no force in the position taken by the counsel for the appellants that the referee's finding of facts is insufficient, and therefore the judgment should be reversed. The findings objected to are

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those relating to the alleged false representations and to the plaintiff's performance of the agreement.

In respect to the first of these, the report of the referee is claimed to be insufficient, inasmuch as it does not find specifically whether the plaintiff did not in fact make the representations alleged ; or whether he made them and they were true ; or whether he made them and they were true but were not fraudulent ; or whether they were made and were false but did not induce the defendants to enter into the contract. The finding in respect to performance by the plaintiff, is alleged to be insufficient, because it does not specify whether other freight was offered and refused as averred in the answer ; or whether or not the vessel could have carried more ; so that it is impossible to say whether the referee concluded that the vessel was full and therefore the plaintiff had performed, or that the vessel was not full, but no other freight was offered, and so the plaintiff had performed.

These several objections assume that the referee was required to report upon every issue made by the pleadings. But a referee is not required to find upon any other facts than those which enter into and form the basis of the judgment to be entered upon his report. He is not required to negative in express terms any other facts. Facts not found are necessarily negatived by implication. (*Code*, § 272. *Nelson v. Ingersoll*, 27 *How.* 1, and cases there cited.) Tested by this rule the report in the present case is clearly sufficient. It would have been sufficient in respect to the points objected to if it had found merely that the parties executed the charter-party set out in the complaint, and that the plaintiff fully performed its requirements on his part. Upon those findings the plaintiff would have been entitled to judgment for the sum found due and unpaid. The finding that the parties executed the charter-party, would have implied necessarily that the agreement was valid and binding upon both parties, and would have negatived the allegation that the defendants were induced to enter into it by fraud on the

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part of the plaintiff. It is wholly immaterial, therefore, whether the finding contained in the report, respecting the alleged false representations, is regarded as expressly negating all, or a part only, of the facts essential to the defense of fraud. The sufficiency of the finding that the plaintiff fully performed the agreement, is equally apparent. It is to be observed that the findings state the terms of the charter-party; that is, they state it to be as set out in the complaint, and the complaint sets out what is therein alleged to be a copy of the charter-party. That being the case, the finding in respect to the plaintiff's performance is sufficiently explicit. It is not necessary to find in what manner he performed, or what particular acts he did by way of performance. If in any proper view of the testimony, a performance is shown, the finding is sufficient; if not, it cannot be sustained.

The next question is whether the findings referred to are against the weight of evidence. I have read all the testimony in the case, and I think that given on the part of the plaintiff fully sustains the conclusions of the referee. The most that the defendants can successfully claim in respect to it, is that it is contradicted in many essential particulars by the testimony introduced by the defendants, but that alone is no ground for reversing the referee's decision. The testimony given on the part of the plaintiff fully meets that given on the other side. The defendant De Vertu testifies that the false representations alleged to have been made by the plaintiff personally, were made by him in a conversation which De Vertu says took place a few days before the charter-party was signed, and was the only conversation between them. But this is contradicted by the plaintiff, who testifies that he never saw De Vertu about chartering the vessel until after the charter-party was signed, he having been represented in the transaction by his agent, Salem. De Vertu also testifies to representations made by Salem as to the capacity of the vessel; but it is apparent from all the testimony, that what Salem said on that subject was intended by him as the

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expression of a mere opinion, and was not relied upon by De Vertu as the assertion of a fact ; at least the referee was warranted in taking that view of the testimony. Salem was a ship broker in New York, and it does not appear that he had any personal knowledge of the vessel. He testifies that in the conversations between him and De Vertu, each party referred to what the plaintiff had told him about the vessel's capacity ; and that when told by De Vertu that the plaintiff had agreed that she would carry 450 to 480 tons of Havre cargo, Salem declined to insert a stipulation to that effect in the charter. He also testified that when the charter-party was made up, and a copy handed to De Vertu, he was anxious to know how much she would carry ; and the plaintiff told him he need not be the least afraid, as she was a large carrier. This item of testimony tends very strongly to show that De Vertu placed no reliance upon any thing that had been said to him by the plaintiff or his agent respecting the capacity of the vessel, before the charter party was signed. In respect to the amount of freight received on board, the substance of the defendants' showing is, that there were some eleven tons which the plaintiff refused to take. The plaintiff testifies that his vessel was full, but the cargo was not heavy. The referee seems to have credited the plaintiff's statement, and it fully justifies his finding, that the plaintiff performed the agreement.

The memorandum offered in evidence by the defendants was properly excluded.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Ingraham and J. C. Smith, Justices.*]

ERNST vs. REED.

The lien which a contractor for the erection of a building acquires by filing a notice with the county clerk, under the mechanics' lien law, (*Laws of 1851, cA. 518,*) attaches only to the legal right, title and interest of the owner, then existing. If, previous to the filing of such notice, the owner has parted with his interest in the property, no lien is acquired.

Where the grantor in a deed hands the same to another with instructions to deliver it, as his agent, presently to the grantee, the delivery not depending upon any condition, as between the parties to the deed, the title passes at the time of the delivery to the agent.

ACTION of ejectment to recover possession of a house and lot on southerly side of 48th street, in the city of New York.

The plaintiff claimed title by virtue of the following facts :

On the 25th of May, 1860, Thomas S. Brooks being the owner of lots on 48th street and 2d avenue (of which the lot in question was one,) made a contract with Charles Huber, by which Huber was to furnish the brown and blue stone for twenty houses, to be erected on the lots, as specified in a written contract, for the price of \$16,400. On the 17th day of May, 1861, Huber filed a lien with the county clerk, upon the twenty houses and lots, in pursuance of an act of the legislature, passed July 11, 1851, claiming a balance due on his contract of \$1,396.

On the 2d day of September, 1861, Huber commenced proceedings against said Brooks, in the Court of Common Pleas, in pursuance of the statute, for the foreclosure of said lien; and on the 22d day of April, 1861, a judgment was duly entered in the said court, adjudging the defendant Brooks indebted to the plaintiff Huber, in such action, in the sum of \$1,597.63, on said contract, (including costs,) and that said Huber had a valid lien, for such amount, on said twenty houses and lots; and further decreeing a sale by the sheriff "of the interest which the said Thomas S. Brooks had, on the 17th day of May, 1861, in the premises." The said interest was sold, in pursuance of the decree, by the

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sheriff; and on the 24th day of June, 1863, the sheriff executed to Charles Huber, the purchaser, a deed of the same, reciting judgment, sale, &c. August 3d, 1863, Charles Huber and wife conveyed the same by deed to Nicholas Ernst, the plaintiff in this action.

The defendant claimed title to the premises by virtue of the following deeds :

1st. Deed of Thomas S. Brooks and wife to Christian Hetzel, dated May 1st, 1861; acknowledged May 9th, 1861; recorded May 30th, 1861. 2d. Deed from Christian Hetzel and wife to Edgar Reed, the defendant, dated September 14, 1861; acknowledged September 19, 1861; recorded October 17, 1861.

The plaintiff claimed and proved on the trial : 1st. That the deed from Brooks and wife to Hetzel was not delivered to, nor accepted by Hetzel until after May 17, 1861, subsequent to the filing of the lien by Huber. 2d. That at the time Hetzel received the deed he had actual knowledge of the filing of the lien of Huber.

The court directed a verdict for the plaintiff, holding that as the deed from Brooks and wife to Hetzel was not delivered to, nor accepted by, Hetzel until subsequent to the filing of the lien by Huber, it was inoperative as against such deed.

Judgment was entered upon the verdict, and the defendant appealed.

E. E. Anderson, for the appellant. I. The lien in this action was filed in May, 1861, and was, therefore, filed in pursuance of the act of 1851, and the acts amending the same. The language of the act is as follows : Any person filing a notice as required by the act shall "have a lien for the value of such labor and materials upon such house or building and appurtenances, and upon the lot of land upon which the same stands, to the extent of the right, title and interest at that time existing of such owner." (*Laws of 1851, ch. 513, § 1. 3 R. S. 5th ed. 812, § 82. Id. 814, § 95.*)

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II. The lien filed by Charles Huber, on the 17th of May, 1861, was only effectual to the extent of the right, title and interest then existing in Thomas S. Brooks, and the interest acquired by the plaintiff in this action can be no other or greater interest than such as existed in Thomas S. Brooks at the time of filing the lien. (*Doughty v. Devlin*, 1 *E. D. Smith*, 629. *Sullivan v. Decker*, *Id.* 699. *Quimby v. Sloan*, 2 *id.* 594.)

III. The contract made between Thomas S. Brooks and Christian Hetzel, effected an equitable transfer of the property in the premises to Hetzel. In equity, the title to the premises vested in the purchaser; the vendor's interest became personalty, he retaining only a lien on the property to the extent of the unpaid purchase money. (2 *Story's Eq.* § 1212. *In the matter of Howe*, 1 *Paige*, 125.) The purchaser's title has always been protected against judgments recovered against the vendor, and against every species of incumbrance affecting the legal title, (except the single case of a purchaser for value without notice,) and this even as to payments made by the purchaser to the vendor after the recovery of the judgment. (*Moyer v. Hinman*, 3 *Kern*. 180. *Parks v. Jackson*, 11 *Wend.* 442. *Ells v. Tousley*, 1 *Paige*, 280. *Towsly v. McDonald*, 32 *Barb.* 604. *Whitworth v. Gaugain*, 3 *Hare*, 416, 425. *Leake v. Leake*, 5 *Irish Eq.* 361, 366. *Prior v. Penpeaze*, 4 *Price*, 99. 2 *Story's Eq.* § 1503, b.)

IV. After the purchaser has paid the entire purchase money there is nothing remaining in the vendor but the dry legal estate. He becomes a trustee for the vendee, is bound to convey the legal title to him, and his assignee, whether voluntary or by operation of law, takes the property affected with the trust, and can be in like manner compelled to convey the legal estate to the vendee. (*Ells v. Tousley*, 1 *Paige*, 280. *Gouverneur v. Lynch*, 2 *id.* 300. *Kiersted v. Avery*, 4 *id.* 15. 3 *R. S.* 5th ed. p. 15, § 47.)

V. There can be no question in this case of protection to
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the plaintiff as a *bona fide* purchaser, without notice, who has intercepted the legal estate, for the reason that our possession was notice to him ; and, furthermore, he only assumed to buy a right, title and interest. (*Moyer v. Hinman*, 3 Kern. 189. *Tuttle v. Jackson*, 6 Wend. 213, 225. 2 *Story's Eq. § 1503, b.*)

VI. Even on the assumption that the legal estate was in Thomas S. Brooks, at the time the lien was filed, the verdict in this case could, therefore, not be sustained. (a.) The plaintiff has disclosed nothing but a barren legal estate, which he is bound to transfer to the defendant. (b.) The defendant has shown the entire beneficial interest to have been in him, or his grantor, before the lien was filed. (c.) The claim, as made by the plaintiff, is grossly inequitable. The holder of the lien knew all the facts connected with Hetzel's contract with Brooks. He knew that Hetzel had furnished work and materials to these houses on the faith of this contract, (among others to the two houses which were conveyed to the lienor,) and yet he seeks by an unwarrantable use of the statutory lien to appropriate to himself the lot which he knew Hetzel had paid for.

VII. But the legal estate was not in Thomas S. Brooks, on the 17th of May, 1861. (*Hathaway v. Payne*, 34 N. Y. Rep. 92.) The delivery to Barton, on the 9th of May, with the instructions to deliver the same to Hetzel, was a good delivery to Hetzel, and passed the legal title. This is settled by decisions innumerable, and has never been questioned. (*Brown v. Austen*, 35 Barb. 341. *Rathbun v. Rathbun*, 6 Barb. 98. *Doe v. Knight*, 5 B. & C. 671, 692. *Quimby v. Sloan*, 2 E. D. Smith, 594. *Scrugham v. Wood*, 15 Wend. 545. *Souwerbye v. Arden*, 1 John. Ch. 253.)

The idea that Brooks could recall this deed, is clearly untenable. On the contrary, it was his legal duty to deliver it. The delivery once made immediately transferred the title to the grantee, and a redelivery of the deed by Barton to Brooks would have passed no title. The question of intention

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was, therefore, material, and was one for the jury to pass on. (*Jackson v. Page*, 4 *Wend.* 586. *Parker v. Dustin*, 2 *Foster*, 424. *Doe v. Knight*, 5 *B. & C.* 671.)

VIII. How then stands this case? The lien filed on the 17th of May, 1861, took effect on the interest of a vendor who had received the whole consideration money, and who had eight days previously delivered the deed of the premises to a third party with instructions to deliver the same to the grantee. What shadow of an interest was left in Thomas S. Brooks to which the lien could attach?

IX. As the plaintiff's title is no better or greater than Thomas S. Brooks', the sustaining of this verdict involves the monstrous proposition that a vendor of real estate, who has received the entire consideration money, who has parted with the deed for the purpose of delivery, may bring an ejectment suit against his vendee; and if he show that the deed did not reach the vendee until after the commencement of the ejectment, he will be entitled to a judgment for the possession of the property.

X. The defense is perfectly available, under the Code, in an ejectment suit. It was so recognized before the Code. (*Parks v. Jackson*, 11 *Wend.* 442.) Since the Code, there can be no doubt that such a defense is good against a complaint in ejectment, and that an equity suit to restrain the prosecution of the plaintiff's claim would be improper if brought after the commencement of the ejectment suit. (*Thurman v. Anderson*, 30 *Barb.* 621. *Dobson v. Pearce*, 2 *Kern.* 166. *Code*, p. 283, 1864. *Auburn City Bank v. Leonard*, 20 *How. Pr.* 195.)

W. L. Townsend, for the respondent. I. The filing of the mechanics' lien by Hüber, and the subsequent foreclosure and sale by the sheriff, and his deed of conveyance under the judgment of the court of common pleas, vested in Huber, the purchaser, at such sale, "all the right, title and interest"

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which Brooks (the defendant in the foreclosure suit) had, on the 17th day of May, 1861, in and to the premises in question. The subsequent deed of Huber and wife to the plaintiff, of August 3, 1863, vested the title in the plaintiff.

II. The deed of Brooks and wife to Hetzel was inoperative as against the lien of Huber, because: 1st. The uncontradicted proof in the case showed that such deed was not delivered to, nor accepted by, Hetzel until subsequent to the filing of the lien. 2d. Hetzel, when he received the deed, had not only constructive but actual notice of the fact that the lien had been filed. It is well settled that a deed takes effect only from the time of its delivery. Acceptance by the grantee is equally necessary to pass the title. (*Jackson v. Dunlap*, 1 John. Cas. 114. *Crosby v. Hillyer*, 24 Wend. 280 *Jackson v. Phipps*, 12 John. 418.)

III. The fact that Hetzel, by his contract with Brooks, was to receive a deed of the premises in question in part payment for the labor and materials furnished by Hetzel on the twenty houses, does not help his title, as against Huber's lien. 1st. Hetzel was not entitled to the deed until the houses were completed, and they were not finished when his deed was executed. 2d Huber's equitable lien for the materials furnished and work done by him was equal to, if not superior to that of Hetzel. Huber's contract amounted to \$16.400, and his work was done prior to that of Hetzel, and enured to his benefit, and as against Huber, Hetzel could have no equity until Huber was paid. 3d. Hetzel, under his contract, had at most but an equitable lien for the balance due him. Huber had a like equitable lien, and, by his diligence, secured a legal lien. 4th. But whatever may have been the equitable lien of Hetzel under his contract, it cannot be set up in this action (an action of ejectment) to defeat a valid legal title. His remedy, if he had any, was by a separate action, to set aside the lien or to have the equity of the parties adjusted.

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By the Court, JAMES C. SMITH, J. The lien acquired by Huber, on the 17th May, 1861, upon the premises in dispute, attached only to the legal right, title and interest then existing in Brooks. (*Laws of 1851, ch. 513, § 1.*)

Before the lien was filed, Brooks had parted with his entire title to the premises. It appears that Brooks had employed Hetzel to perform work and furnish materials in the construction of buildings on certain premises, of which the lot in dispute was a part, and in payment for such work and materials he had contracted to convey to Hetzel the house and lot in suit. Hetzel performed the contract on his part, and Brooks, in pursuance of its requirements, executed a deed of the premises in dispute, to Hetzel, dated the 1st May, 1861, and on the 9th May delivered it to William D. Barton, with instructions to deliver it to Hetzel. Barton handed it to James Saxton to deliver to Hetzel, and Saxton retained it in his hands till the 18th May, 1861, when he delivered it Hetzel. It is apparent from the uncontradicted testimony of Barton, that the delivery of the deed to Hetzel did not depend upon any condition, but the depositary was made the agent of the grantor to deliver the deed presently, to the grantee. Barton testified that he would have delivered the deed to Hetzel the same day he received it, if he had seen him. As between the parties to the deed, the title passed at the time of the delivery to Barton, (34 *N. Y. Rep.* 92,) and consequently Brooks had no interest in the premises when Huber filed his lien.

It follows that the judgment should be reversed and a new trial be ordered.

[NEW YORK GENERAL TERM, April 8, 1867, *Leonard, Ingraham and J. C. Smith, Justices.*]

NESSLE and others vs. REESE and others.

Where the *gist* of an action was the alleged use by the defendants of a secret process of enameling, which R., one of them, had covenanted with the plaintiff not to divulge, and the exclusive right to use which, the plaintiffs claimed to have acquired from R. by purchase; it was *held* that there was no ground for the exercise of the equitable jurisdiction of the court, unless it was established that the defendants, some or one of them, were using the same secret process to which the covenants related, or that they threatened or intended to make the secret known, contrary to the stipulations of R.

Where there was no positive evidence that the process in question was used in the business carried on by the defendants; the only testimony on that point, produced by the plaintiff, being that of himself, detailing some circumstances observed by him in the defendants' shop, which tended in some degree to show that the process there used was the one in question, but came far short of establishing the fact; and the testimony of R. left it at least doubtful whether he used the process in question while in the employ of his co-defendant; *Held* that the refusal of the judge to find that such process was used in the defendants' business was not error; and that the testimony was not so clear and satisfactory as to warrant the court in finding the fact, contrary to the implied finding of the judge.

THE plaintiffs seek to enjoin the defendants from disclosing or using a certain secret process or method of compounding and applying porcelain enamel to iron and other wares. The secret was, on the 22d day of October, 1861, agreed to be, and on the 22d day of November, 1861, was, transferred by the defendant Reese and wife to Josiah Foster, jr.; by Foster to J. B. Hubbard, April 28, 1864, and by Hubbard to two of the three plaintiffs, September 21, 1864. The Reeses covenanted and agreed, under a forfeiture of \$5000, settled upon as liquidated damages, to be paid to Foster by them in each and every case of violation of the covenant (1) to keep the secret, and not in any way divulge it, and (2) not to perform the process.

On the trial, before Justice MILLER, at special term, the court dismissed the complaint, on the ground that the damages for the breach of the covenants in the agreements of October 22d and November 22d, 1861, were therein fixed

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and liquidated between the parties thereto ; and that therefore the plaintiffs were not entitled to relief by injunction to restrain the breach of such covenants.

From this decision the plaintiffs appealed.

John E. Burrill, for the appellants. I. The court erred in its decision that because the damages were liquidated in the agreement between the original parties, the plaintiffs were not entitled to the remedy by injunction.

II. The objections which have been urged to the granting of equitable relief, and interference by injunction to restrain the disclosure or publication of secrets or matters of confidence, were considered in the cases cited below, where the court asserted and exercised jurisdiction. It makes no difference on what ground the jurisdiction has been placed ; the fact that the court will, under certain circumstances, exercise jurisdiction in this class of cases, shows that there is nothing in the nature of the interest or right sought to be protected which prevents a court of equity from interfering where circumstances warrant it. The objection on the part of the defendants is, that the court has no power, and that not having the power, it is inexpedient to exercise it. The fact that on the trial the defendants themselves proved that they were engaged in using the process or method in question, relieves this case from a circumstance which has sometimes unnecessarily embarrassed the court. (*Morison v. Moat*, 6 Eng. Law and Eq. 28. *S. C. on appeal*, 9 *id.* 182 ; 9 *Hare*, 241. *Green v. Folghamb*, 1 *Sim. & Stu.* 398. *Youatt v. Winyard*, 1 *Jac. & W.* 395.) In the first cited case the court disposed of the objection, that the exclusive method had not been patented, in these words : "What we have to deal with here is not the right of the plaintiffs against the world, but their right against the defendant." (P. 31.) See also *Barfield v. Nicolson*, (1 *Sim. & Stu.* 1,) which was decided on the ground of contract, and not of copyright. The cases in 2 *Merivale* and 3 *Merivale* are considered in *Youatt*

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v. *Winyard*, (1 *Jac. & W.* 393.) In 3 *Merivale* the refusal to grant the injunction was put on the ground that the defendant denied the charge in his affidavit. The court said: "If the defendant has disclosed the secret, the injunction can be of no use. If he threatens to disclose, then we must look into his affidavit; and by that he insists that what he has to disclose is no secret." In the case before the court, the defendants admit that the process is a secret, and deny that Reese has disclosed it to Hudler, but say that though he keeps it to himself, he is using it for the benefit of Hudler, and is employed for such purpose against the defendants. (P. 31.) The court below was with the plaintiffs in these views of the law upon all the objections urged, except the specific part mentioned in the opinion, viz: that the damages were liquidated.

III. The conceded insolvency of the parties to the contract, showing that no adequate relief could be obtained by an award of pecuniary damages, in connection with the other circumstances in the case, entitled the plaintiffs to equitable relief by injunction. (*Clark v. Flint*, 22 *Pick.* 238. *Winnepissee Co. v. Wooster*, 9 *Foster*, 449.)

IV. The principle upon which the court placed its decision, namely, that the damages were liquidated, has no application to the case before the court, or, if applicable at all, was not available to the defendants. 1. The defendant, Hudler, was not a party to the agreements in question, and no action could have been maintained against him on the agreements or covenants referred to. In other words, there was no contract on his part, and no action at law *ex contractu* lay against him. 2. The plaintiffs were not parties to the agreements which were made between Reese and wife, on the one hand, and Foster on the other, and the agreement in respect to liquidated damages was with Foster, and not with his assigns, and was not available to the plaintiffs. 3. All which the assignee of Foster could recover under the agreement, would be the damages which Foster had sustained by

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a breach of it during the time he, Foster, remained proprietor of the secret, and before he transferred. 4. The plaintiffs have no remedy against Reese and wife on the agreements in question, for a breach of the covenants therein contained, nor have they any remedy on contract against Hudler, but their sole remedy is by a proceeding in equity.

V. The ground upon which the judgment of the court below was put is untenable, and the judgment should be reversed.

Elial F. Hall, for the respondents. I. This is a case of liquidated damages, and not of a penalty. (*Cotheal v. Talmage*, 5 *Selden*, 551. *Bagley v. Peddie*, 16 *N. Y. Rep.* 469. *Clement v. Cash*, 21 *id.* 253. *Staples v. Parker*, 41 *Barb.* 650. *Fletcher v. Dyche*, 2 *Term Rep.* 32. *Cheddick's executor v. Marsh*, 1 *Zabriskie Rep.* 463.)

II. We have not been able to find a case in which a court of equity has interfered either by injunction or by a decree for specific performance to prevent the breach of an agreement, in case of which breach the promissor has agreed to pay a specific sum by way of liquidated damages. The following cases are directly the other way: *Woodward v. Gyles*, 2 *Vern.* 119; *Saintier v. Ferguson*, 1 *Macnaughten & Gordon*, 287; *Carnes v. Nisbett*, 1 *Hurlstone & Norman*, 778. *Vincent v. King*, 13 *How. Pr.* 234; *Barnes v. McAllister*, 18 *id.* 534; *Nessle v. Reese*, 29 *id.* 382; See also *Rolfe v. Peterson*, 2 *Brown's Cases in Parliament*, 436; *Sloman v. Walter*, 1 *Brown's Ch. Rep.* 418; *Carden v. Butler*, *Hays & Jones' Irish Exchequer Rep.* 112; *Fox v. Scard*, 33 *Beavan*, 327, and remarks of Lord Mansfield, in *Lowe v. Peers*, 4 *Burrow*, 2228. The case of *Morison v. Moat*, (6 *English Law and Eq. Rep.* 14,) is not in point. There the liquidated damages and the injunction applied to two different things. The covenant was, not to communicate the secret, but the injunction was, not to use it. It restrained the defendant from making or compounding any medicines according to the

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secret. It appears from the last page of Vice-Chancellor Turner's opinion, (*page 36*,) that there was no allegation in the bill of any intention to communicate the secret. Why did the solicitor who drew the bill, omit an allegation of such vast importance to his client? Obviously because he foresaw that if he pleaded as a ground for relief in equity, the intended or threatened breach of a covenant, the breach of which had been provided against by an express agreement to pay liquidated damages, he would be turned out of court.

III. Nor are the plaintiffs any better off in a court of equity for that the defendants Reese "have no property and are irresponsible." Three judges of this court have decided this precise point: Judge BALCOM, in *Vincent v. King*, (13 *How.* 234;) Judge MILLER, in the case at bar at special term, and Judge BARNARD, also in the case at bar, on the motion at chambers for an injunction, which he denied, stating, in his memorandum indorsed on the papers, that the plaintiffs must sue on the bond. Mr. Fry expressly repudiates the principle contended for by the plaintiffs, and says: "It is evident that this principle applies to all damages, and if it were admitted, would give the court jurisdiction in all cases of contract, whether for the sale of chattels, or of any nature, which certainly is not the law of the court." (*Fry on Specific Performances*, p. 8, § 19, *page 50*, *Am. ed.*)

IV. At common law there is no such thing as property in a secret. It cannot be parted with. After a transfer, it still remains in the possession of him who has communicated it, as much as before. (*Dudley v. Mayhew*, 3 *Comst.* 9. *Deming v. Chapman*, 11 *How. Pr.* 382. *Comstock v. Moore*, 18 *id.* 421.) There are practical difficulties in this case, the same as those which induced Mr. Justice LEONARD to dissolve the injunction in *Barnes v. McAllister*, (18 *How. Pr.* 534.) 1st. It appears, from the cross-examination of Nessle, that other firms in New York and Philadelphia are enameling iron by the same process, at least so far as he could judge. 2d. The court found, *sixthly*, that the said process was first

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communicated to Hubbard, not by Foster, his assignor, but by one Crompton. This, then, is no longer a secret. (*See Williams v. Williams*, 3 *Merivale*, 160.)

V. The court at special term found that the defendant Hudler, was carrying on the iron enameling business, and that the defendant Henry Reese was working in his employment, but refused to find that this business was conducted "according to the said secret process and method." There was a failure of proof as to identity. On the part of the plaintiffs there was no evidence to establish it. Reese on his *cross-examination*, speaking of himself and Hubbard, said: "*we made a new discovery ; the new discovery is my own secret ;*" and then he goes on, speaking of being in Hudler's employ, and of using this new secret—his own secret, and not the one in question in this action, which several years before he had transferred to Foster. Again, the evidence failed to show as the plaintiffs claim, that Hudler combined and conspired with Reese to evade the performance of the agreement between the Reeses and Foster. The court found that he had notice and knowledge of this agreement. There was no proof of this, except the explicit admission of Hudler in his answer. His answer then must be taken as a whole, and we must assume that he honestly believed what he there states, to the effect that Reese had become rightfully re-possessioned of the right to use the secret in consequence of Foster's failure to pay for the iron patterns sold to him. The court did not find, and there was not a particle of proof that Hudler knew any thing about the claims of these plaintiffs to such a secret, before the commencement of this action. The charge of fraud and bad faith against him therefore fails.

And if then, an injunction would not be issued against Reese, who if anybody besides the plaintiffs, is the party principally at fault, then of course it could not be issued against Hudler, who at the most, is only an accessory. If the court would enjoin those who employ Reese, then it would enjoin those whom Reese employs, and in fact all who do

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business with him. But it will not thus do by indirection, what it cannot do directly. It will not by circumvention evade and override the express agreement of the parties, which fixed and limited the remedy, in case of breach, to the recovery of a specific sum by way of liquidated damages, in a court of law.

By the Court, JAMES C. SMITH, J. This case was argued by the counsel for the appellants principally upon the ground that the judge who tried the cause erred in holding that the plaintiffs are not entitled to relief by injunction against the breach of the covenants of the defendants Reese, for the reason that the damages for the breach of those covenants are fixed and liquidated by the terms of the agreement.

In the view which I take of the case it is unnecessary to consider the proposition above stated, for even if we should concur in it, the plaintiffs would not be entitled to a reversal of the judgment, upon the facts found by the judge.

The *gist* of the action is the alleged use by the defendants of the secret process of enamelling which Reese covenanted not to use or divulge, and the exclusive right to use which, the plaintiffs claim to have acquired from Reese by purchase. Unless it is established that the defendants, some or one of them, are using the same secret process to which the covenants relate, or that they threaten or intend to make the secret known, contrary to the stipulations of Reese, there is no ground whatever for the exercise of the equitable jurisdiction of this court. Neither of these facts is found by the judge who decided the case. The nearest approach to them is the finding that the defendant Hudler has been and is carrying on the iron enamelling business in the city of New York, and that the defendant Henry Reese is working in the employment of said Hudler, in said business.

It appears by the case, that on the trial, the plaintiffs requested the judge to find that the defendants conspired to violate the provisions of the agreement referred to, and in pursuance of such conspiracy have been and still are engaged

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in the business of mixing and applying porcelain enamel to hollow and other iron wares according to the said secret process and method, and that the knowledge of Reese and his wife in regard to said secret process is used in and about said business, but the judge refused to find in accordance with such request. The plaintiffs' counsel excepted to the refusal, and this raises the question whether the refusal was erroneous; or, in other words, as the refusal is equivalent to a finding against the plaintiffs upon the point involved in the request, the question is whether such finding is unsupported by the evidence, or is against the weight of evidence. On looking into the case, it will be seen that there is no positive evidence that the process in question was used in the business carried on by Hudler. The only testimony on that point, produced by the plaintiff before he rested, was that of the plaintiff himself, who stated some circumstances observed by him in Hudler's shop, which tended in some degree to show that the process there used was the one in question, but they came far short of establishing the fact. The plaintiff himself summed up his testimony on the point, by saying, "I should judge from the appearance it must be the same thing. I can't swear that they enamel according to this same method—but they look precisely as ours." The only additional testimony upon the point was elicited from the defendant Reese, on his cross-examination by the plaintiff. He testified that when he worked for Hubbard in 1863, after the agreements were made under which the plaintiffs claim, he did the mixing for the enameling there; that he did not do it according to the way he did before they made a new discovery—and the new discovery was his own secret. He then stated that he afterwards went to work for Hudler and attended to the enameling for him; but it is at least doubtful from his testimony whether he there used the process in question, or the process which he discovered while in Hudler's employ. Upon this state of the testimony, the judge would have been justified in find-

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ing that the process in question was not used in Hudler's business, and it follows that his refusal to find the reverse of that, was not error. The testimony is not so clear and satisfactory as to warrant us in finding the fact contrary to the implied finding of the judge before whom the cause was tried.

These views render it unnecessary to examine any of the other questions discussed on the argument, and lead to an affirmance of the judgment.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Ingraham and James C. Smith*, Justices.]

SIMPKINS vs. LOW.

In an action to recover damages for refusing to deliver bonds, alleged to have been bought by the defendant as the plaintiff's agent, the plaintiff, to prove the value of the bonds, may show that they were paid by the company issuing them, in gold. He may also prove what gold was worth, in currency, at that time. (J. C. SMITH, J. dissented.)

It is erroneous to limit the plaintiffs' recovery, in such an action, to nominal damages, where there is proof that the bonds were worth par, in gold, as collateral security, and the evidence warrants the conclusion that they were worth more than par, in currency.

Such evidence should be submitted to the jury, and it should be left with them to assess the damages, free from any restriction. The legal tender act, passed by congress, is not to be construed as excluding such evidence from the consideration of the jury.

It was not intended, by that act, to enable an agent, after having received for a claim gold coin, to relieve himself from liability by payment in currency. (Per INGRAHAM, J.)

Where there are no actual sales of an article, a witness may give his opinion of the value of such article. (Per INGRAHAM, J.)

THE complaint in this action alleges that the plaintiff employed the defendant to buy forty bonds of \$500 each, in all \$20,000, of the San Francisco Water Works Company. That the defendant, while employed as the plaintiff's agent, bought the bonds for \$23,000. That the plaintiff claimed

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and demanded the bonds of the defendant, but he refused to deliver them, and converted the bonds to his own use. That the value of the bonds is \$50,000. That the plaintiff is damaged to the extent of \$27,000, and judgment was demanded for that amount. The answer denies the agency, and the purchase for the plaintiff, and the conversion ; and claims the bonds as the defendant's.

On the trial, before a justice of this court and a jury, the plaintiff proved an employment of the defendant, in February, 1864, to buy these bonds of a man named Emery, in Maine. It appeared that the defendant bought the bonds during that February of Emery ; that Emery knew nothing of any employment or agency of the defendant, and sold the bonds to him. The defendant paid for the bonds with his own money, and afterwards refused to let the plaintiff have them. The defendant moved for a nonsuit, on the ground that the action would not lie, because the plaintiff showed no title to the bonds. The motion was denied, and the defendant excepted. The case then went to the jury on the question of damages. On this part of the case, the evidence was that the bonds were ordinary obligations of this corporation for the payment of so much money, with interest, and that they were due in April, 1864. Also, that there was no market price for such bonds in 1864, either at San Francisco or at New York, and that the highest price paid for them, in any single transaction, was 106, which was below the price paid to Emery. The plaintiff then offered to prove, by a person who held other bonds of this company, maturing at the same time and of the same date, that they were paid in gold. The evidence was excluded. He then offered to show, by a person who was an officer of the company, that the company ordered its treasurer to pay the bonds maturing at this time in gold, and that all the bonds of this issue were paid in gold on presentation. This evidence was also excluded. This witness made a statement that the bonds were worth the value of gold—at that time being \$2.40 in legal tender notes for \$1 gold, but this value was in

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their use as collateral security. He knew of no sales. The defendant moved to strike out this evidence; the judge, however, refused to do so, and the defendant excepted.

The defendant's counsel having summed up the case, the judge stated that he was satisfied the plaintiff could only recover nominal damages, as the bonds had no market price, and no intrinsic value, legally, beyond the amount due by them, measured in the lawful currency of the country, i. e. \$20,000; and he instructed the jury to render a verdict for the plaintiff for nominal damages only, to which the plaintiff excepted.

The jury rendered a verdict for six cents, and the defendant had judgment for costs; from which the plaintiff appealed.

James O. Carter, for the appellant. I. The relation of principal and agent, which subsisted between the plaintiff and the defendant, was a purely legal relation, and whatever property the defendant purchased as the plaintiff's agent became *eo instanti* the property of the plaintiff, unless the defendant had taken the title to himself in such a manner as to require the execution of some formal instrument of assignment or transfer to the plaintiff. In the latter case the plaintiff would have the equitable title. (*Robinson v. The United Ins. Co.*, 1 *John*. 592.)

II. The purchase by an agent of a chattel or chose in action transferable by delivery, vests the legal title in the principal, and an appropriation of the thing thus purchased by the agent to his own use is a conversion, for which trover would lie. The circumstance that the agent paid for the article purchased with his own money, at the request of the principal, would not affect the question of title. It would give him a lien for the price, which is not inconsistent with the legal title being in the principal.

III. But the question where the legal title to the bonds was is wholly immaterial. It was the duty beyond question

of the defendant to have given the plaintiff the benefit of the purchase, and for this breach of duty an action lies.

IV. The frame of the complaint embraces either view of the case, and in either view the measure of damages is the same, viz. what the plaintiff has lost. He has lost the value of the bonds, less the price the defendant paid for them.

V. Treating the action as in the nature of trover, the plaintiff was entitled to a verdict for the full value of the bonds, without any deduction for the price he had paid for them. (*Vincent v. Conklin*, 1 *E. D. Smith*, 203.) One who has converted property to his own use, is not entitled to set up a lien in mitigation of damages. He must resort to his separate action to recover his debt. The plaintiff was, therefore, entitled to a verdict for the full amount of the bonds, without reference to the gold question.

VI. The plaintiff was also entitled to a verdict for the highest value the bonds had borne at any time prior to the trial. This is the invariable rule in cases of trover, and also in cases of tort, where, though the action is not trover in form, the damages are to be arrived at by ascertaining the value of property of which the plaintiff has been deprived. (*Blot v. Boiceau*, 3 *Comst.* 78. *Parsons on Cont.* 5 *ed.* vol. 3, p. 190, *et seq.* *Romaine v. Van Allen*, 26 *N. Y. Rep.* 309.) *West v. Wentworth*, 3 *Cowen*, 82. *Ch. J. Kent*, in *Hart v. Ten Eyck*, 2 *John. Ch.* 116. *Arnold v. Suffolk Bank*, per *Emott J.* *Wilson v. Matthews*, 24 *Barb.* 295. *Wilson v. Little*, 2 *N. Y. Rep.* 443.) 1. This results necessarily from the maxim that a wrongdoer is not to be permitted, in any event, to make a profit out of his misdeeds. 2. The rule is specially applicable to the present case, where it was the manifest object of the defendant to secure to himself the profit of the purchase.

VII. The damages sustained by the plaintiff were to be computed in the treasury note currency. 1. It was in this currency that he would be compelled to receive satisfaction.

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2. By a law of political economy the most depreciated currency supplants all others, and such is the fact with us.

VIII. The law holds itself competent in all cases where one man has sustained a pecuniary injury, by the act or omission of another, to ascertain and determine its amount. Least of all does it scandalize itself by the disgraceful confession that a gross fraud can be permitted to pass unpunished from any inability on its part to estimate the extent of the injury.

IX. The ground upon which the learned judge excluded the evidence offered as to the value of gold, and upon which his direction to find a verdict for nominal damages only was based, was that by virtue of the act of congress hereinbefore referred to, it was not allowable to found a claim for damages upon the difference in value between gold and paper currency. This was error. 1. The act of congress enacted only that the treasury notes should be a legal tender for the payment of debts. It did not affect to deal with the question of the actual value of the paper currency. Any such interference, would, by well understood principles of political economy, have been quite ineffectual. 2. To determine what shall constitute a legal tender for the payment of debts, is within the power of legislation; but to determine what shall be the exchangeable value of things, is wholly beyond the power, and therefore outside of the province, of governments. 3. Not only did congress not affect to make the values of gold and paper currency equal, but it has in divers ways recognized the fact, that they are not, and cannot be made equal. (a.) In requiring the payment of duties in gold. (b.) In agreeing to pay interest on its bonds in gold. (c.) In laws providing for the deposit of gold in the treasury, by way of loans to the government, which are to be paid in gold. 4. It is manifest that these laws cannot be obeyed and executed unless the courts everywhere recognize the difference between gold and paper currency. 5. It is believed this difference is now in

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fact constantly recognized in all the courts, except in those cases *ex contractu*, in which the question arises as to what will discharge a debt.

X. When the value of any thing is sought to be proved, with the view of recovering such value in the way of damages, the regular mode of procedure is to prove it by the market value, at the place nearest the forum of the controversy. If the thing is of such a character that it cannot be said to have a market any where, then the nature and characteristics of the thing are to be proved, and upon such evidence the jury are to base their decision. (*Harris v. The Panama R. R. Co.*, 5 *Bosw.* 312. *Marshall v. The N. Y. Central R. R. Co.*, 45 *Barb.* 502.) In the case of a thing having no market value, every thing connected with it tending to show the pecuniary advantage which accompanies its ownership is receivable in evidence.

XI. The case of a chose in action, such as a bond, forms no exception to the general rule, and the value of the bonds in question was proved in exact accordance with the rules above stated. 1. The only place where there could be said to be any market for the bonds was in San Francisco—and a witness, Charles H. Simpkins, who could tell their value, if any one could, testified that they had been worth, since the time of the transaction, as high as 260. 2. It turned out, indeed, that the witness could not state any sales since 1863. But this does not destroy his evidence as to value. A man familiar with things and with such dealings as are held in them, is competent to speak of their value, even at a time during which he can state no transactions. Inquiries about the value of commodities, offers made and reported, are a sufficient foundation to make the judgment of a witness receivable. 3. It is every day's practice for brokers and merchants to testify as to the prices of commodities at times when they know of no transactions. The ignorance of transactions is a circumstance to go to the jury to influence the weight to be given to the testimony. 4. The main point is,

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whether the witness occupied a position from which he could form a fair judgment as to the value. 5. It further turned out that this witness had never known a sale of the bonds for paper currency ; and for the good reason that transactions in that currency were never known in California. But the only effect of this was to make it important to know whether he had rightly estimated the value of gold. It certainly could not render his evidence wholly incompetent. 6. If this were so, then had the securities been English *consols* as to which we should have had to prove the market value in London, the difficulty would have been just as fatal. 7. But why the value of gold should not, after the above evidence had been given, have been permitted to be proved, it is hard to understand, except upon the view entertained by the learned judge that it was *illegal* to raise the question of a difference between the value of gold and paper currency. This point has been already discussed. The learned judge would not certainly have held that in the case of English *consols*, after proving the market value in London, the value of sterling currency could not have been proved.

XII. The learned judge was evidently under the impression that inasmuch as *by law* no more than the par value of the bonds in currency could be collected from the obligee, the payment of them *in gold* would be a *gratuity* ; and that the fact of such a gratuity could not be made the basis of a claim for damages. In fact, he seemed to suppose that it was *in legal contemplation, impossible*, that a chose in action upon which nothing more than *par* could be collected should have a greater than *par value*. But this is a clear error.

XIII. What has been said is sufficient to show that error was committed in excluding the evidence offered. But, in fact, much of the evidence excluded, was, in one way or another, received in the course of the trial, and the learned judge denied a motion to strike it out. In this way there was enough evidence in the case to warrant the jury in finding a large verdict for the plaintiff, and the final direction of the

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judge was error. 1. It was proved that *in fact*, by custom universally recognized, gold was the only currency in use in California, and that all obligations were paid in it. 2. It was proved that this very issue of bonds was paid in gold. 3. It was proved that they always bore the par value, or but very little less, in gold. 4. It is a fact which the court and jury judicially know, that gold was at an enormous premium during the very time to which the proper rule of damages relates, and the value of gold itself is really sufficiently proved by the witnesses who testified that the bonds were worth from 240 to 260 in currency, as it is clear that their judgment was formed by converting the value of gold into paper currency. 5. Could not the jury say upon all that proof that the plaintiff had sustained damage, and measure against a wrong-doer the amount of it, especially when the legal rule by which their estimate was to be governed was, that they should see to it that the plaintiff should have the benefit of the highest value before the trial, so that the defendant should not make a profit by his fraud? 6. Finally, on a principle of law already adverted to, the plaintiff was entitled to a verdict for the *par* value of the bonds, even supposing all the views of the learned judge as to the gold question to be well founded.

James Emott, for the respondent. I. This is an action for the conversion of the property which is the subject of the suit, to wit, the forty bonds. The complaint alleges their purchase by the defendant for the plaintiff, and that the latter owned, and had a right, to them, and it asks damages for their conversion. Such an action will not lie. The plaintiff never paid any thing for the bonds, and never had the possession of them. He never even tendered the money for them, and had no title to them.

II. Assuming all that is claimed by the plaintiff, yet he did not become the legal owner of the bonds, and had no right and no remedy, except in equity, to enforce a trust upon the bonds in the defendant's possession, and against the legal

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title of the latter. Where an agent or trustee to buy for another, buys for himself under circumstances which deprive him of the right of so doing, his title to the property purchased is not void, but voidable only at the suit of the principal or *cestuis que trust*. The latter does not obtain title by such a purchase. All that he can do is to proceed in equity to set aside the purchase of the trustee, and have the property conveyed to himself. (*Sweet v. Jacocks*, 6 Paige, 355. *Johnson v. Bennett*, 39 Barb. 237, 249. *Olcott v. Tioga R. R.*, 27 N. Y. Rep. 546, 567. *Smith v. Lansing*, 22 id. 520.) And in such a case as this, of naked parol agency, this relief cannot be had if the agency is denied. (*Bartlett v. Pickersgill*, *Eden R.* 515.)

III. The action being brought for a conversion, the plaintiff cannot be allowed to recover for a nonfeasance or neglect of duty. That would be to change the whole cause of action. (*Moore v. McKibbin*, 33 Barb. 246.)

IV. The plaintiff should, therefore, have been nonsuited in this action, because he showed no title to the property.

V. If, however, on this state of the pleadings and proofs, the court will go on to consider what action might be maintained, the only ground for a suit will, of course, be that of neglect of duty by the defendant, as an agent ordered to buy certain property for his principal, in not so buying it.

VI. In this, which is the only possible aspect of legal liability, it makes no difference that the defendant bought the property for himself. That fact belongs to the frame work of a totally different suit. Here the case is precisely the same as if he had not bought the bonds at all. The injury to the plaintiff is not that the defendant bought this property for himself, but that he did not buy it for the plaintiff. The action is for negligence—non-feasance.

VII. We say, then, that no action will lie by a person who employs another to do an act without paying him, and without placing any money or property in his hands, against that person, for a mere neglect to do the act. There is no con-

sideration, and no legal damage. (5 *T. R.* 143. *Coggs v. Bernard*, 2 *L. Raym.* 909.)

VIII. There is no legal proof of damage in this case, because there is no proof that the plaintiff actually lost any such bonds as he desired to purchase. These were not the only such bonds in existence. They were a commodity of which there was more, part of a class of which they were but a small number. The defendant did not have the plaintiff's money and invest it against orders, or withhold it so as to prevent the plaintiff investing it. *Non constat*, that the plaintiff could not, and did not, buy other bonds. Again, the plaintiff never made any contract to purchase these bonds, and there is no legal proof of what they would have cost him. There is no agreed price, and no market price, in Maine, with which to compare a New York price. The damages are too remote. (*Short v. Skipwith*, 1 *Brock. C. C. Rep.* 193. *Bell v. Cunningham*, 3 *Pet.* 69. *Greening v. Wilkinson*, 1 *C. & P.* 625.)

IX. At the utmost, only the market value could be considered. If the defendant had had the funds, and withheld them, or invested them contrary to orders, the enhanced market value of the article which he was ordered to buy is the only measure of damage, and not intrinsic value, or any peculiar value of the article to the plaintiff. (*Smith v. Coudry*, 1 *How.* 28.) The property in this case possessed no market value whatever.

X. In any view of the case, the plaintiff's damages can be only nominal. We have already seen that the property which the defendant failed to buy had no market value, so that no recovery could be predicated upon the difference between the selling price and the market price. But the controlling feature of the case on this point is, that these bonds were simply evidences of debt—obligations for the payment of money. Such obligations may be worth more than their face, or the amount due upon them, if they have become articles of merchandise in the stock market, and have

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a market price. Such is the fact with various railroad bonds, state, town and county bonds, &c. These are bought and sold, and they may be worth more or less than their face, or *par*. But where such obligations have no such market price, they are simply worth the amount due upon them — that is, their only legal value.

XI. As obligations and evidences of debt, they were payable and capable of discharge in the lawful currency of the country, whatever that is. The bonds were worth, intrinsically, what the obligors could be compelled by law to pay or perform upon them; and this was simply \$20,000 and six months' interest.

XII. It would make no difference if the legal tender law were unconstitutional, because that would change the currency or vehicle of payment of the price of the bonds, and of the amount due or required for tender by the plaintiff, as well as of the amount due on them. In other words, if gold were the only legal measure of values, then it must measure all the values in the case; and the buying price and selling price, and the amount of damages must all be stated in gold. If "greenbacks" are not money, 240 in greenbacks is not a money price or measure of value at all.

XIII. In effect, all this follows from the fact that the instruments in question were evidences of debt, contracts for the payment of money, and not contracts for the delivery of bullion or merchandise. There can be no value predicated of such contracts but the amount due upon them, which the court can only estimate in so many dollars, leaving the law to say in what currency it is to be paid; unless, as already stated, the instruments or obligations are regularly bought and sold, and have a market price. It would be extraordinary to hold that, while if the plaintiff had held the bonds, and he could have enforced them for only \$20,000, yet against a person who had broken a contract or duty to get them, they could be valued at \$36,000.

XIV. Evidence to show that the debtors had paid these

bonds in gold coin, and not in legal tender notes, and evidence of a price of gold in market, that is, of a difference in the value of these two kinds of currency, was properly rejected ; and the jury were correctly instructed, that there was no evidence in the case upon which more than nominal damages could be recovered. The notes of the government are a lawful tender for the payment of debts. (*Legal Tender cases*, 27 *N. Y. Rep.* 400.) Gold and silver coin is nothing more, and cannot be regarded by the courts as possessed of any different or greater value legally as a medium in which a debt may or has been paid. If the defendant had agreed to buy the bonds and collect the money on them, in gold, for the plaintiff, and had so collected the money, *in gold*, and had not paid it over ; the tender of an equal number of dollars in legal tenders, would have been an offer of full performance.

XV. If the courts could attach any different value in law to \$20,700 paid in gold coin from \$20,700 paid in legal tender notes, still it would not help this case, because the payment in coin was a mere gratuity. The company which issued these bonds agreed for nothing but a payment in legal tender notes ; they could be compelled to nothing more. This sale was before maturity. All that could possibly be predicated on the subject was a chance or expectation that this company would pay in gold. This expectation is not a legal cause of value or a subject of sale. (*Munsell v. Lewis*, 4 *Hill*, 635, and cases cited.)

XVI. Of course, the fact that the bonds were actually paid in gold coin afterwards, cannot affect the legal aspect of this case, or the rights of the parties. That was a purely voluntary act ; and if it was any thing more than simply payment of the debt in the eye of the law, it certainly cannot make obligations, which did not require it, worth more at a time previous to their payment.

It must not be forgotten that this action, if it lies at all, does not rest on any property of the plaintiff in the bonds, for he never had any, but on an injury to him by neglecting

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to buy them, which is to be measured by the difference between their agreed price, if there had been any, and their value at that time, which is again the amount payable and collectable by them.

INGRAHAM, J. This action was brought to recover damages for refusing to deliver certain bonds. The question arising in the case is as to the proof of damage, and the ruling of the judge that the plaintiff could only recover nominal damages.

The plaintiff, to prove the value of the bonds, offered to show that they were paid in gold by the company issuing them. This was excluded by the court. He also offered to prove what gold was worth in currency, at that time.

I think this evidence was admissible. The plaintiff could recover the value of the converted property at any time between the conversion and the trial; and the fact that they had been paid in gold was admissible to show what sum the plaintiff had lost by the wrongful act of the defendant.

I think, also, the judge erred in limiting the recovery to nominal damages. There was proof of their value if paid in gold. It is true that was the opinion of the witness, merely, and not an actual sale. But where there are no actual sales of an article, a witness may give his opinion of the value of such article. Simpkins testified that the bonds were worth par, in gold, as collateral security; that he had borrowed on them at that rate; their value in currency was 260. He also states previous sales in gold at 90 to 95. He adds that their value was 240 to 260 in currency, not that he knew of sales to that amount. This evidence was in the case, and the judge refused to strike it out. It was before the jury, and certainly warranted the conclusion that the bonds were worth more than par in currency. I do not consider the legal tender act passed by congress, as excluding this evidence from the consideration of the jury. The charge of the court seems to have been founded on that statute. I

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think the evidence should have been submitted to the jury, and that it should have been left with them to assess the damages, free from the limitation which the court put upon them.

The true question was not what the obligors could be compelled to pay for them, but what they actually did pay, in ascertaining the plaintiff's loss. Suppose the defendant had retained the possession of the bonds until their payment, would it not have been admissible to prove that fact, and that the defendant received on such payment, gold to the face of the bonds? I cannot think that it was intended by the legal tender act, to enable an agent to receive for a claim, gold coin, and relieve himself from liability by payment in currency. Not that a contract may be violated, and the party in default relieve himself from damages by paying in currency for what he has realized in gold.

The question will be presented more forcibly by suggesting the case of one who has a sum of money in gold coin to deliver to another, which he refuses to deliver, and converts to his own use. Would justice be satisfied by holding the defendant excused on paying that amount in currency? The same principle must govern here.

A new trial should be ordered, costs to abide the event.

LEONARD, P. J. concurred.

JAMES C. SMITH, J. (dissenting.) I am of opinion that this case was correctly disposed of at the circuit.

Whether the true theory of the action is that the defendant is liable by reason of his neglect to purchase the bonds for the plaintiff, or that the plaintiff became the owner of the bonds through the defendant's purchase, and the defendant is liable for their conversion, in either case the measure of the plaintiff's loss is the excess of the value of the bonds over and beyond the sum which the defendant paid for them. There is no legal evidence that the value of the bonds ever

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exceeded the sum paid for them by the defendant, and consequently the plaintiff is not entitled to recover more than nominal damages, in any aspect of the case.

Prima facie, each of the bonds, forty in number, was worth only the sum payable by its terms, to wit: 500 dollars, or 20,000 dollars in the aggregate, being 3000 dollars less than the amount paid by the defendant. This was not conclusive, however, and it was competent for the plaintiff to show, if he could, that the bonds were worth more than par. He undertook to prove that they were worth much more than the defendant paid for them, but the testimony produced by him was insufficient for that purpose. The proof showed that the bonds were issued by a corporation in the state of California, known as the San Francisco Water Works Company. They were issued in 1859, and were made payable in April, 1864. The whole amount of bonds created was 150,000 dollars, but the amount actually issued by the company was only 84,500 dollars. The bonds were never sold in public market, and there was no market price for them in San Francisco, New York or elsewhere. The only private sales shown, were the one in controversy, and four others which took place in 1860 or 1861, at San Francisco, at prices ranging from ten per cent below par, in gold, to six per cent above. In the absence of evidence that the bonds had a market value exceeding the price paid by the defendant, the plaintiff proved, or offered to prove, that customarily all transactions in California are in gold currency, unless otherwise expressly agreed; that the receipts of the company for water dues were collected in gold; and that the company, in pursuance of a resolution of their board of directors, paid in the like currency other bonds of the same issue as those in suit, upon presentation. The plaintiff also offered to prove the market price of gold in July, 1864, and it may be assumed, for the present purpose, that between the time of the defendant's purchase in February, 1864, and the commencement of this suit, gold was sold in market at a pre-

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mium of 140 per cent—that is, at 240 per cent in paper currency. But all this testimony fell short of establishing that the bonds had any other than their *prima facie* value. They were not, by their terms, payable in gold ; and if they had been so payable, the company, nevertheless, would have had a right to satisfy them by paying, or offering to pay them, in legal tender notes. (*Rodes v. Bronson*, 34 *N. Y. Rep.* 649.) Payment by the company, of more than the face of the bonds, would have been a mere gratuity. If it had been shown, however, that the probability, or even expectation, that the company would pay the bonds in gold, gratuitously, had raised their price in market above their par value, the case would have been materially different ; but there is no evidence that such was the fact.

The testimony of the plaintiff, and of his brother, that the bonds were worth in currency whatever gold was worth, to wit, from 240 to 260 per cent, adds nothing to the plaintiff's case. It is apparent from the cross-examination of these witnesses that they had no facts to go upon, except those above stated, and that their testimony on the subject of the value of the bonds is simply the expression of an opinion, or rather of a truism, that if the bonds were in fact paid in gold, they were worth, to the holder, what gold was valued at in the market.

The judgment should be affirmed.

New trial granted.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Ingraham and J. C. Smith*, Justices.]

SMITH *vs.* LIPPINCOTT and others.

Although a complaint sets out an express agreement, it will be sustained by evidence of an implied one.

An implied agreement to pay for materials, &c. when not inconsistent with an existing written agreement between the parties, is admissible in evidence, and will sustain an action to recover the value of such materials.

APPEAL from a judgment entered on the report of referees. The action was brought against the defendants, composing the firm of J. B. Lippincott & Co. to recover moneys by the plaintiff paid, laid out, and expended for work, labor and materials necessary to the preparation of a work entitled "Smith's New Geography" for publication, and for divers maps, plates and drawings procured by the plaintiff in the preparation of said work, and delivered to and used by the defendants.

On the 27th of October, 1858, the plaintiff and defendants executed a contract, under seal, in and by which the plaintiff covenanted that he had a work entitled "Smith's New Geography," and the copyright; that the defendants should have the sole and exclusive right to publish and vend the same, and every edition; that he would renew the copyrights, as permitted by law, and revise and amend the same, from time to time, as should be required by the defendants. The defendants, on their part, covenanted to *publish* said work at their own proper expense and cost, to use all proper exertion to sell and dispose of the same, to pay the plaintiff ten per cent of the net wholesale price for each copy published, and to furnish an account of sales every six months.

The referees found, as matters of fact, that the plaintiff, at the time of making the agreement in writing with the defendants, of October 27, 1858, had expended divers sums of money for materials and for drawing and engraving, and other labor connected with the publication of his work, entitled "Smith's New Geography," and that a further expenditure was then necessary for the purpose of entirely preparing said work for publication; that upon the execution of the

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49b 398
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said agreement, the defendants, in consideration that the plaintiff would enter into the same, and would deliver to them the materials, plates, drawings, maps and other results of the work and labor so procured by the plaintiff, promised the plaintiff to pay and reimburse him for all the moneys and expenses which at the time of the execution of the said agreement the plaintiff had laid out and incurred, and which he might thereafter necessarily expend or incur in and about the preparation of the said work for publication; that the defendants have, since the execution of the said agreement, published the said work, and the plaintiff has delivered to them all the said work, and all the said maps, plates, drawings and other results of the labor so procured by him in the preparation of said work for publication, and the defendants have used the same in the publication thereof. That the plaintiff has laid out and expended for work and labor and materials necessary to the preparation of said work for publication, divers sums of money, amounting in the whole, on the 15th of November, 1860, to the sum of \$6271.87, when an account thereof was duly rendered by the plaintiff to the defendants; that the plaintiff is now, and during all the times in the pleadings mentioned was, a resident of the state of Connecticut, and during the same time the defendants were and now are residents of the Commonwealth of Pennsylvania; that by the laws of both of said states, the rate of interest collectable on due and unpaid demands is six per centum per annum.

Upon the foregoing facts, they found, as conclusions of law, that the plaintiff was entitled to recover from the defendants the foregoing sum of \$6271.87 with interest thereon, at the rate of six per cent per annum, from the 15th day of November, 1860, to the date of the report, the said principal and interest amounting in the whole to \$8028.36, and for which amount they directed judgment in favor of the plaintiff against the defendants, with the costs of the action.

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From the judgment entered on the report, the defendants appealed.

Randolph, Alexander & Green, for the appellants.

Waldo Hutchins and *Wm. F. Allen*, for the respondent.

By the Court, JAMES C. SMITH, J. After a careful examination of the testimony in this case, I fail to find any evidence of the express oral agreement alleged in the complaint and found by the referees, to wit, that upon the execution of the agreement in writing mentioned in the pleadings, the defendants, in consideration that the plaintiff would enter into the same, and would deliver to them the materials, plates, drawings, maps and other results of the labor theretofore performed by the plaintiff in connection with the publication of his work entitled "Smith's New Geography," promised the plaintiff to pay and reimburse him for all the moneys and expenses, which at the time of the execution of the said agreement the plaintiff had laid out and incurred, and which he might thereafter necessarily expend or incur in and about the preparation of the said work for publication. There is no evidence of any express oral agreement whatever, made at the time of the execution of the written contract, and none of an express oral agreement made at any time, in consideration that the plaintiff would enter into the written contract and furnish to the defendants the plates and other materials which he had theretofore procured. If, therefore, the plaintiff's right to recover depended upon an express agreement of the import above stated, the judgment appealed from could not be upheld.

But there is ample testimony in the case from which an agreement by the defendants to pay the plaintiff for the plates and other materials referred to may be implied, unless such implication is precluded by the terms of the written contract—a point that will be considered presently. It is proved

without contradiction, that the plaintiff furnished the defendants with plates and other materials, at their request, and that the defendants used them in the publication of the work which by the terms of the written agreement they undertook to publish "at their own proper expense and cost." It is also proved that after such materials were furnished, the plaintiff rendered an account of them to the defendants, at the prices paid or incurred therefor by the plaintiff, and the testimony warrants the conclusion that the defendants repeatedly admitted their liability to pay the plaintiff the actual cost of the materials. They objected, however, that the amount of such cost was overcharged in the account rendered, but the proof shows that there was no ground for the objection.

I am of opinion that the written agreement, properly construed, does not cover the subject matter of the implied contract, to wit, the plates and other materials theretofore procured by the plaintiff in preparation for the publication of the work. It is, in brief, an agreement by the plaintiff that he has a work entitled "Smith's New Geography," for which he is entitled to a copyright, that the defendants shall have the sole right to publish and vend it, and that he will take out copyrights for it as often as the law will permit, and will revise and amend it from time to time. The defendants, on their part, promise to publish the work at their own proper cost and expense, and to pay to the plaintiff ten *per cent* of the net wholesale price for each copy published. There is nothing on the face of the agreement to show that the parties intended that the plaintiff should furnish to the defendants the materials he had procured in preparation for the publication of the work. The agreement contains no such stipulation, in terms, and it does not refer to such materials in any way. There is no proof in the case that as matter of usage among publishers and authors it was incumbent on the plaintiff, in the absence of an express agreement upon the point, to furnish to the defendants the plates and

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other materials of the character referred to, needed in or adapted to, the publication of the work. If we look outside of the written agreement to learn the intention of the parties on that subject, we find that the evidence of such intention consists mainly of the dealings of the parties respecting such materials subsequently to the making of the agreement, and that it preponderates strongly, as has already been said, in favor of the position that the defendants recognized their liability to pay the plaintiff for the materials furnished by him at their request. In fine, under the written agreement, the plaintiff was not bound to furnish the defendants the materials he had procured, and the latter were not required to accept them. If, however, they accepted them and used them in the publication of the work, there is nothing in the written agreement to repel the presumption that they undertook to pay for them.

It being clear, then, from the testimony before us, and the law applicable to it, that the plaintiff is entitled to recover upon an implied agreement, to the full amount reported by the referees, the judgment should not be reversed, although the report is based upon an express agreement not proved. The relief granted is not inconsistent with the case made by the complaint, and is embraced within the issue litigated on the trial. (*Code*, § 275. 2 *Kern*. 336. 16 *N. Y. Rep.* 263.)

The judgment should be affirmed.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Ingraham and J. C. Smith*, Justices.]

HOWE vs. SAVORY and others.

By the terms of an agreement between S. and the plaintiff, the business relating to a joint adventure was to be done in the name of the plaintiff alone, and it was so done, in fact, S. contributing nothing to the adventure in money, services or time. The defendants dealt with the plaintiff in his individual name, and treated him as the only person interested. *Held* that the plaintiff might maintain an action to recover a balance due from the defendants on account of the adventure, without joining S. as a co-plaintiff.

Held, also, that if S. had in fact an interest in the subject matter of the action, as between himself and the plaintiff, the latter might be regarded as the *trustee* of S. to that extent, and, as such, entitled to sue in his own name.

The general rule is that sums received from third persons by an agent, in the business of his principal, either as profits or compensation, belong to the principal. But this rule being for the benefit of the principal, he may waive it, and with his consent the agent may retain to his own use moneys thus received. The evidence of such consent, however, should be clear and satisfactory.

A PPEAL from a judgment entered upon the report of a referee.

In 1863 and 1864, the defendants were co-partners in business in New York, under the firm name of Geo. Savory & Co. and in Buenos Ayres, under the firm name of E. H. Folmar & Co. The plaintiff was in their employ as confidential clerk and book-keeper in the city of New York, down to about 24th May, 1864. While in their employ he made sundry purchases of merchandise *in his own name*, consisting of kerosene oil lamps, sewing machines and tobacco, and shipped the same *in his own name* from New York, consigned to the defendants at Buenos Ayres. Before the purchase, it was contemplated between him and one Augustus T. Savory; that the latter should be jointly and equally interested in the purchase, and that each should furnish one half the capital. The first two shipments were paid for by the checks of the defendants, and were charged on their books to an account headed "H. & S. shipments per *Providence* and *Candace*." The two other shipments were paid for by moneys raised upon the joint note of the plaintiff and A. T. Savory. The note was subsequently paid and taken up by the plain-

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tiff, who has ever since held it. On the 24th May, 1864, the defendants were indebted to the plaintiff on an account current in the sum of \$2261.47, and he called on them for payment. They refused it, unless their advances (\$2026.69) for the payment of the goods shipped by the *Providence* and *Candace* were deducted. The plaintiff expressed a willingness to deduct one half, but the defendant Savory refused to settle on those terms, and insisted that it was the plaintiff's individual matter, and that the charge on the defendants' books against him and A. T. Savory jointly was a mistake, and that the advances should have been charged to the plaintiff's private account, as it was his individual business. The advances were finally allowed and deducted from the account, leaving a balance of \$234.78, which the defendants paid to the plaintiff, and charged the advances to his individual account on their books. Subsequently he called upon A. T. Savory to pay one half of the amount so deducted, and also one half of the amount of the note above mentioned, but he refused payment, and, in fact, he never contributed any thing in time, money, or services to the adventure. At the time of the third shipment the plaintiff made another shipment by the same vessel, *in his own name*, under the same consignment, which was made on the joint account of himself and one John T. Lanman. All of the goods thus shipped were duly received by the defendants' firm at Buenos Ayres, and sold for account of the owner. A part of the proceeds of sale they invested in a quantity of dry hides, and shipped the same to the plaintiff *in his individual name*, some of which were in his hands, and unsold at the time of the commencement of this action. On the 15th of November, 1864, they rendered him an account of sales, showing a balance of \$301.50 in his favor, and at the same time wrote him stating that they had interested him to that extent in an invoice of twelve bales of horse hair which they had shipped to their house here. In February, 1865, he called upon them for an account of sales of the horse hair, and on the 21st of that

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month they rendered him a statement of sales showing a balance of \$686.96 to *his individual credit*. This balance they refused to pay over, and this action was brought to recover the amount.

The answer sets up the non-joinder of A. T. Savory as a party plaintiff, and also a counter-claim of \$742.13 for moneys had and received by the plaintiff for the defendants' use. The facts in regard to the counter-claim are as follows : While the plaintiff was in the defendants' employ, he purchased goods for them of Thomas D. Moore & Co. upon which they paid him a commission of \$137 out of their profits. He collected and received this amount at the express suggestion, and with the consent of the defendants. He subsequently purchased goods from two other parties, and received from them commissions amounting to \$491.92

The referee disallowed the counter-claim, and rendered judgment for the plaintiff for the amount of his claim ; from which judgment the defendants appealed.

Weeks & Foster, for the appellants.

Henry W. Johnson, for the respondent.

JAMES C. SMITH, J. I think the defense of the non-joinder of Augustus T. Savory as a party plaintiff was properly overruled, in view of the peculiar circumstances of the case. By the terms of the agreement between him and the plaintiff, as found by the referee, the business relating to their joint adventure was to be done in the name of the plaintiff alone, and it was so done in fact. Savory contributed nothing to the adventure in money, services or time. The defendants dealt with the plaintiff in his individual name, and treated him as the only person in interest. Under these circumstances, I am of opinion the plaintiff may properly maintain the action. If Savory has, in fact, an interest in the subject matter of the action, as between himself and the plaintiff,

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the latter may be regarded as the trustee of Savory to that extent, and as such entitled to sue in his own name.

The defendants set up a counter-claim for moneys received by the plaintiff, from third persons, by way of commissions on goods purchased of them by him as the clerk of the defendants, and on their account. The general rule is that sums received from third persons by an agent in the business of his principal, either as profits or compensation, belong to the principal. This rule being for the benefit of the principal, he may waive it, and with his consent the agent may retain to his own use moneys thus received. The evidence of such consent, however, should be clear and satisfactory. In the present case the referee has found that the commissions paid by Moore & Co. were received by the plaintiff with the express consent of the defendants, and at their suggestion. The counter-claim for the item was, therefore, properly disallowed. But it is not found that the commissions paid by Suplee and by Morrison were received by the plaintiff with the defendants' consent or knowledge, or that there was any waiver of the rule as to those items. It follows that the plaintiff is not entitled to retain them, and that the counter-claim should be allowed to that extent.

The judgment should be reversed, and a new trial ordered, unless the plaintiff will remit the amount of the commissions received from Suplee & Morrison, with interest thereon, in which case the judgment, so reduced, should be affirmed, with costs.

INGRAHAM, J. The evidence shows that the commissions from Moore & Co. were received by consent of the defendants; and such consent may be inferred as to the commissions paid by the others, and from the knowledge of the defendants that the plaintiff was so acting, without any objection on the part of the defendants.

LEONARD, P. J. dissented.

Judgment reversed.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Ingraham and J. C. Smith*, Justices.]

SHARP vs. SIMONS & GABSED.

By a contract between the parties, the defendants agreed to procure fifty cotton warps to be manufactured, and to sell and deliver them to the plaintiff, at a specified price, to be paid on delivery. The defendants delivered 28 of the warps to the plaintiff, and procured the remaining 22 to be manufactured, but instead of delivering them to the plaintiff, they sold them to another person, at a price exceeding that which the plaintiff agreed to pay, and used the proceeds. In an action by the plaintiff, to recover such excess, the complaint alleged the transaction to be a sale by the defendants of warps belonging to the plaintiff and delivered to the defendants as his agent, to sell on his account.

Held, 1. That the contract was executory, and under it the title to the warps did not pass to the plaintiff, till delivery.

2. That without title to the 22 warps, the plaintiff could not adopt the sale made by the defendants, as his own; his only remedy being for a breach of the executory agreement to deliver them to him.

3. That he could not recover in this action, with the complaint in its present form, without establishing an express agreement by the defendants to sell the warps on his account.

APPEAL from a judgment entered on the verdict of a jury. The complaint alleged that on June 17, 1864, the plaintiff delivered to the defendants twenty-two cotton warps belonging to the plaintiff, to be sold for him on commission, the proceeds to be accounted for by them to him; the commission to be 2½ per cent for selling and guaranty—an alleged sale by the defendants—a demand of an account of sales and refusal; and the action was brought for the proceeds. The answer denies any such transaction; any delivery of any warps to be sold for the plaintiff; any undertaking on the defendants' part to sell for the plaintiffs any warps, or to account for, pay over or guaranty the proceeds of any such sale, or any damages. The case was tried at the circuit before a justice of this court and a jury, who, under the charge of the judge, rendered their verdict for the plaintiff for the amount claimed, \$1322.19.

The defendants appealed from the judgment.

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Jos. H. Choate, for the appellants.

F. N. Bangs, for the respondent.

By the Court, JAMES C. SMITH, J. By the original contract between the parties, the defendants agreed to procure fifty cotton warps to be manufactured, and to sell and deliver them to the plaintiff, at a specified price to be paid on delivery. The defendants delivered twenty-eight of the warps to the plaintiff in pursuance of the contract, and they procured the remaining twenty-two warps to be manufactured, but instead of delivering them to the plaintiff, the defendants sold them to another person, and used the proceeds. The sum received by them exceeded the price which the plaintiff agreed to pay, and that excess the plaintiff seeks to recover in this action. In his complaint he alleged the transaction to be a sale by the defendants of warps belonging to him and delivered to the defendants as his agents to sell on his account. In support of that allegation he testified on the trial, that after the twenty-eight warps had been delivered, the defendants, who were commission merchants, agreed with the plaintiff to sell the remaining twenty-two warps for him on commission. That statement was contradicted by the testimony of the defendants. The question thus raised was submitted to the jury, and if this were all of the case it would be free from error.

But the learned judge, on being requested by the defendants' counsel to instruct the jury that the plaintiff could not recover, unless they were satisfied that subsequently to the original contract, an agreement was made by which the defendants undertook to sell the twenty-two warps for the plaintiff's account, declined so to charge. Further, he charged the jury, in substance, that even though there had been no contract to sell on the plaintiff's account, the plaintiff might ratify the sale, and regarding the defendants as having sold

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on his account, and as having received the proceeds, might look to them as his factors.

In so charging, and declining to charge, I am of opinion the learned judge fell into an error. The original contract was strictly executory. Under it, the title to the warps did not pass to the plaintiff, till delivery. Without title to the twenty-two warps he could not adopt the sale as his own. His only remedy was for a breach of the executory agreement to deliver them to himself. He could not recover in the present action, or at least, under the complaint in its present form, without establishing an express agreement by the defendants to sell the warps on his account.

I think the judgment should be reversed and a new trial ordered.

[NEW YORK GENERAL TERM, April 3, 1867. *Leonard, Ingraham and J. C. Smith, Justices.*]

HENRY VAN SCHAICK and others, executors of Myndert Van Schaick, deceased, *vs.* THE THIRD AVENUE RAILROAD COMPANY.

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A lease taken by A. in trust for a corporation thereafter to be formed, creates, on the formation of such corporation, and upon its receiving an assignment of such lease, with knowledge of the terms upon which it was executed and received from the lessor by A., a liability in equity, on the part of such corporation, to pay the rent to the lessor; and such liability cannot be avoided by a transfer of the lease, by the corporation, to B.

THE object of the action was to compel the defendant, as the equitable lessee, to perform the covenants contained in a lease of thirty-three lots of land at the corner of Sixty-first street and Third avenue, in the city of New York, made by Myndert Van Schaick, the original plaintiff, to Henry Van Schaick.

The action was originally tried before the special term held

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by Justice DAVIES, in the city of New York, on the 15th day of March, 1859, and resulted in a judgment for the plaintiff. An appeal was taken by the defendant to the general term, where a new trial was ordered. A second trial took place before Mr. Justice MULLIN, in December term, 1863, when judgment was again given for the plaintiff. The appeal is from that judgment. The original plaintiff having died, the action was continued in the name of his executors.

The facts shown in the case on the last trial were as follows :

In January, 1853, the city of New York made a grant to thirteen persons of the right to construct and operate the Third Avenue Railroad. Three stage companies, the Pearl street, Harlem and the Bullshead lines were then running on the Third avenue. The grant was obtained through their influence, with the understanding that their stage property was to be purchased by the grantees. The Pearl street line then had a lease for ten years of the property in question from Myndert Van Schaick, the original plaintiff. On the 4th of January, 1853, an unincorporated association was formed of the grantees, including the proprietors of the three stage lines, under the name of the Third Avenue Railroad Company. The articles of partnership are set out at page 34. The proprietors of the three stage lines insisted upon having a definite contract with the association for the purchase of their lines, and on the 28th of April, 1853, a resolution was passed unanimously to purchase the property of each line. The resolution provided for the purchase, from Dewey, Dingledein & Co., the proprietors of the Pearl street line, of their lease of the thirty-three lots, with the buildings thereon. The next day, Dewey, Dingledein & Co. made a contract accordingly. Between that time and the 16th of August, 1853, the members of the association, at its meetings, had discussed the propriety of forming a corporation from the association, where the members of the association should have the same rights, and escape personal liability beyond the amount they held in it. And the propriety of having a lease, from Myndert Van

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Schaick, of the thirty three lots held under the lease to Dewey, Dingledein & Co. was also discussed. He was willing to give such a lease. A resolution was thereupon offered in the association on that day, that it was expedient that a lease for fifteen years, from July 9, 1853, be executed "by Myndert Van Schaick to Henry Van Schaick, to be held by him for the benefit of this company, or such other company as may be formed to carry on the Third Avenue Railroad, shall, at any time hereafter, have a right to demand of him;" and "that this company, and such other company as may be hereafter so formed in its stead as above, will and do assume" the covenants, &c. This resolution, after lying over one day for consideration was, on the 17th of August, 1853, passed unanimously, every member of the association voting. Henry Van Schaick was not, at the time, a member of the association. It was in the discussion said that a corporation should be formed under the general railroad act, and that the association should sell out to it, and that if the corporation were formed, "*this lease was to be for the benefit of the corporation, and the corporation was to have it from Henry Van Schaick the same as the association.*" Among the suggestions, it was said that it would "*be for the benefit of the partnership and the succeeding corporation, that the title should not be placed in Dewey, Dingledein & Co., but in some person to hold as trustee;*" and Henry Van Schaick was, therefore, selected as the trustee. In pursuance of the resolution, a new lease was made by Myndert Van Schaick to Henry Van Schaick of the lots above mentioned, bearing date April 16, 1853, and acknowledged August 18, 1853. At the time of its execution, there was an agreement executed on behalf of the association, by its president, with Henry Van Schaick, in pursuance of the resolution of August 17, 1853. This agreement declares distinctly that the lease from Myndert Van Schaick to Henry Van Schaick, "*though absolute on its face, was made to the party of the first part, (Henry Van Schaick,) solely for the benefit of the said parties of the*

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second part, and of such other company as may be thereafter formed to succeed them in their business," &c. ; and the company agreed to assume, and that it did assume, the performance of its covenants. It was always kept in an iron safe, belonging first to the association, and then to the corporation.

On the 8th day of October, 1853, the corporation was formed under the same name which the unincorporated association bore — the Third Avenue Railroad Company. The corporation consisted, with one exception, of the members of the unincorporated association. The unincorporated association, by deed dated the same day, conveyed to the corporation all its property except a portion reserved to pay certain of its debts, but including the thirty-three lots in question. It was a sale from the association as an unincorporated association to a corporation consisting of the same persons. The assignment, in terms, conveyed to the corporation *all the leases* belonging to the association. It was a simple carrying out of the previous plan for converting the association into a corporation. The unincorporated association had been in the possession of the thirty-three lots from the time its road was completed, under the lease to Dewey, Dingledein & Co., the Pearl street line. It continued in possession when the lease was made from Myndert Van Schaick to Henry Van Schaick as trustee for the association ; and when the association became a corporation, the possession continued in the corporation, and the corporation went on paying the rent to Myndert Van Schaick. This possession continued until 1858, when the corporation assigned the lease to Searles, after the formation of the corporation, and on the 7th of November, 1853 ; and it being in possession of the thirty-three lots of land, Henry Van Schaick assigned to it the lease he held as trustee from Myndert Van Schaick.

Myndert Van Schaick had held in his own name leases of three other pieces of real estate for the association ; and on the same day that Henry Van Schaick made his assignment

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to the corporation, Myndert Van Schaick assigned to the corporation two of the leases ; the third he, at the request of the association, transferred to other persons to pay debts of the association.

On the formation of the corporation, as above stated, all the persons interested in the association, except one, became and were corporators ; and the corporation succeeded to all the property, rights, duties and obligations of the association, and went on with its business without interruption, "with the same drivers and same everything."

From the time of the execution of the assignment of the declaration of trust from Henry Van Schaick and the assignment of the lease to the corporation, those papers, respectively, were kept in the safe of the association, and then of the corporation.

'When the Central Park was opened, the corporation paid the assessment upon the lots, and when an award was made for part of the lots taken for widening Fourth avenue, Myndert Van Schaick paid to the corporation its proper proportion of the moneys.

On the 1st of July, 1854, the corporation made a mortgage to J. Philips Phoenix and Cornelius W. Lawrence, for \$150,000, and among the mortgaged property included the thirty-three lots leased, together with the depots, buildings, and improvements thereon. The mortgage recites an agreement to execute and deliver to the mortgagees' trustees, as security for bonds to be issued, its railroad, "with all and singular the *leases*, depots, stables and other buildings, cars, &c. property and appurtenances of the said railroad, as hereinafter mentioned," and then includes in the description : "A certain indenture of lease made by Myndert Van Schaick to Henry Van Schaick, dated the 16th August, 1853, duly recorded, with the demised premises therein mentioned, containing thirty-three lots of ground on Sixty-first street and on Fourth and Lexington avenues, together with the depots, buildings and improvements thereon erected, with the rights,

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privileges and appurtenances to said described premises belonging ; and also all the estate, right, title, interest, term of years yet to come, and unexpired property, possession, claim and demand whatsoever, as well in law as in equity, of the said Third Avenue Railroad Company, in and to the said demised premises."

January 13th, 1858, the corporation sold the lease to Samuel Searles for \$5. The buildings then upon it had cost several thousand dollars. Searles was one of the car-drivers employed by the corporation at \$1.50 per day. He sold the buildings for \$300, and never paid any rent. He owned, at the time, very little property, and the president, who made the sale to him, did not know that he had any property ; and he states that the sale was made to him to get rid of the liability for rent.

There was no contradiction of any of the foregoing facts.

The conclusions of law of the justice before whom the action was tried, were as follows :

"That the defendants are subjected to the burthens of said lease, certainly to the extent of relieving and indemnifying Henry Van Schaick, to the extent of his liability to the plaintiff, and such right to indemnity of said Henry Van Schaick is the property of the plaintiff.

That in equity the plaintiff is entitled to enforce against the defendants the duties and covenants in said lease contained, they having accepted the same as made for their benefit and advantage, and having used and occupied the premises under the said lease as leasees, and not otherwise.

That the plaintiff is entitled to recover against the defendants the amount of unpaid rents, from the first day of February, 1858, quarterly, with interest thereon.

That the defendants pay, discharge and satisfy all the unpaid taxes and assessments on the lands described in said lease.

That said defendants pay the rent already due, and the rent to become due and payable upon said lease as the same shall become due and payable, and also pay and discharge

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seasonably all taxes and assessments which have been, or may hereafter be levied, assessed or charged upon said premises during the term in said lease expressed."

Judgment having been entered by the plaintiff on the said decision, the defendants appealed.

Robt. B. Potter, for the appellants.

William Tracy, for the respondent.

By the Court, JAMES C. SMITH, J. When this case was before the court on the former appeal, the judgment theretofore rendered in favor of the plaintiffs' testator was reversed, and a new trial was ordered, by a divided court. The majority of the court were of opinion that as the case then stood, there was no evidence of an adoption by the defendants, express or implied, of the liability of the original *cestui que trust* to pay the rent reserved by the lease, and on the ground above they concurred in a judgment of reversal. That point is therefore the only one adjudged by the decision.

On the second trial, which is now under review, considerable testimony was given, in addition to that appearing on the first, and the learned justice before whom the last trial was had, found as matter of fact that the defendants, on becoming incorporated, impliedly agreed to pay the rent, and perform all the covenants of the lease, and assumed the position of lessees, and he decided that in equity the plaintiffs are entitled to enforce against the defendants the covenants of the lease, and the duties created by them.

The counsel for the appellants contends that even as the case now stands, there is no evidence warranting the conclusion of fact above stated; and that upon no ground are the defendants liable to pay rent accruing after their assignment of the lease to Searles, and their transfer to him of the possession of the premises. As it will not be difficult to deduce the defendants' liability from the alleged agreement, if the latter be established, the case is substantially narrowed down

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to the question whether there is sufficient evidence to support the finding of fact.

I am of opinion that the testimony satisfactorily establishes the implied agreement found by the judge at special term. It is proved, beyond doubt, that the lease for the term of fifteen years from 9th July, 1853, although executed to Henry Van Schaick, nominally, was in fact so executed at the request of the incorporated association then existing, and known as "The Third Avenue Railroad Company," and for the benefit of said association, and of such other company as should be formed thereafter to carry on the railroad then owned by the association; and that as between Van Schaick and the association, the former was a mere trustee, and the latter was to pay the rent to Myndert Van Schaick, the lessor. This is shown by the testimony of Reynolds, the declaration of trust and the resolutions of April 28th and August 17th, 1853.

It also appears from the latter resolution referred to, and the written contract executed in pursuance of it, that the association expressly agreed with Henry Van Schaick that they and the said company would assume, and the association did thereby assume, the performance of all the covenants in the lease which, by its terms, were to be performed by him.

It next appears that the defendants were created a corporation on the 8th October, 1853, under the provisions of the general railroad act, by the joint action of all the members of the association save one, for the purpose of maintaining, operating and finishing the construction of said railroad. The action of the members of the association, in forming such corporation, was authorized by the articles of association, which provided that the members might incorporate themselves, under the general railroad act, whenever two thirds in interest should require it. The same name by which the association had been known was given to the corporation. The association transferred to the corporation, on the day it was organized, the bulk of the property of the

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association, including the lease and premises in question. The corporation at once accepted the property, entered upon the premises, and engaged in and continued the business of operating the railroad. On the 7th November, 1853, it received from Henry Van Schaick his assignment of the lease, and it used the premises and paid the rent from the time of its organization until the transfer to Searles, in January, 1858. In June, 1854, the corporation mortgaged the lease in question, and the premises demised by it, to secure the bonds of the corporation issued for money then borrowed, to the amount of \$150,000.

The important circumstance also appears, that all the transactions of the corporation, above mentioned, were had with full knowledge, on the part of their president and of a majority of their directors, of all that had previously occurred respecting the lease, as above stated, including the fact that the association had agreed, in behalf of itself and *of the company which should succeed it*, to perform the covenants in the lease.

These facts and circumstances clearly justify the conclusion that the defendants adopted the engagements made in their behalf by the association which they succeeded, and that when they entered into possession they were regarded and treated by all parties, themselves included, as the absolute owners of the leasehold estate remaining, and as bound to pay the stipulated rent to the end of the term created by the lease. On the transfer to the corporation, the association or partnership was practically terminated. Thenceforth all parties evidently regarded the liability of the association and of its members as such, for rent accruing upon the lease, as at an end. The corporation intended to take, and it did take, the place of the association as *cestui que trust* and lessee, and assumed all the liabilities of the association in respect to the lease.

There can be no doubt that under the original arrangement

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the lessor might have compelled the association, in a court of equity, to perform the covenants in the lease, although the association was not named in the lease, as a party to it. His executors have now the same right against the defendants, they having adopted the agreement made by the association. Although the agreement which the defendants adopted was made with Henry Van Schaick, yet as they thereby became liable to pay rent to the testator of the plaintiffs, the latter may enforce the obligation. (20 N. Y. Rep. 268.)

The case is not the ordinary one of a naked assignment by an original lessee to a subtenant, and in the view above presented, it is clearly distinguishable from *Walters v. Northern Coal Mining Company*, (5 DeGex, McN. & G. p. 629,) cited by the appellants' counsel.

For these reasons I am of opinion that the judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 3, 1867. *Leonard, Ingraham and J. C. Smith*, Justices.]

POWERS vs. SHEPARD.

An agreement by the supervisor of a town to pay a stipulated sum to another, in consideration that the latter will recruit and furnish for the former, and for his town, a certain number of three years naval recruits, or the credit of the same duly made, which sum exceeds the rate of \$600 for each man, contravenes the provisions of section four of chapter 29 of the laws of 1865, forbidding the payment of bounties above the amount therein prescribed, and is therefore void.

The fact that such a contract is not made with a volunteer, nor for the payment of bounties, will not authorize a recovery thereon. The policy of the law is destroyed by permitting contracts for procuring volunteers by the payment, to any one, of an amount beyond the sums prescribed by the act for bounty and hand-money.

The act of February 10, 1865, (*Laws of 1865, ch. 29*,) was not repealed by the act of February 24, 1865, (*Laws of 1865, ch. 41*;) it being the intention of the

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legislature that the former act should be considered in full force, notwithstanding the enactment of the latter.

The provisions of chapter 29, of the Laws of 1865, prescribing a maximum sum to be paid for enlisting soldiers, and forbidding the payment of a higher sum by cities, counties, &c. are not unconstitutional.

The 4th section of that act took effect immediately, notwithstanding the provisions of chapter 41 of the laws of 1865, suspending the operation of the sections of chapter 29, incorporated into chapter 41, and there re-enacted.

MOTION by the plaintiff for judgment on a verdict rendered in his favor, subject to the opinion of the court at general term.

The case proved is briefly this: In March, 1865, the defendant was the supervisor of the town of Sparta, in the county of Livingston, and as such was engaged in raising recruits to fill the quota of that town under the call for men for the army and navy of the United States, issued by the president on the 19th December, 1864, or the next call thereafter. For that purpose he entered into an agreement in writing with the plaintiff, dated at Jersey City, the 9th March, 1865, by which he, as such supervisor, authorized the plaintiff to recruit and furnish for the defendant and for his said town, 17 three years naval recruits, or the credit of the same duly made, for each of which he agreed to pay the sum of eight hundred dollars. On the 21st March, 1865, he made a second agreement, indorsed upon the first, by which he undertook to pay to the plaintiff for furnishing the recruits provided for in the first agreement, the additional sum of eight hundred and fifty dollars besides the amount mentioned in said first agreement. The plaintiff furnished the number of men provided for, between the 21st and the 25th March, and the defendant paid the sum stipulated in the first agreement. This suit was brought to recover the additional sum of \$850, under the second agreement. On the trial the defendant moved to dismiss the complaint, on the ground that the contract sued on is void, and is in violation of the laws of this state, and particularly of chapter 29 of the Laws of 1865, and of the fourth section

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of that act. The motion was denied, and the defendant's counsel excepted.

The court directed a verdict for the plaintiff, subject to the opinion of the court at general term.

Ira D. Warren, for the plaintiff. I. The legislature passed an act on the 10th day of February, 1865, which is chapter 29 of the laws of 1865. On the 24th day of February, 1865, they passed another act, or repassed the act of February 10, 1865, except §§ 11, 12, 13, 14; these sections were altered and changed in various respects by the last act. (*Chap. 41, Laws of 1865.*) The evident intention of the legislature in repassing this act of February 10, was to make it conform to the requirements of the constitution, and have the act submitted to the people before any part of it should become a law. The act of February 10, 1865, § 4, declares that §§ 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, shall take effect immediately; while § 11 provides that *this* act, which includes all these sections, shall be submitted to the people. The sections which the legislature here declare shall take effect immediately all depend upon §§ 8, 9, 10; if those were rejected by the people, the other sections could not be carried out. This act of February 10, 1865, was therefore clearly in violation of article 7, § 12, of the constitution. In the act of February 24, they provide that this act, which includes §§ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, of the act of February 10, "*shall not take effect until after the next general election,*" which would be in November, 1865, &c. We have therefore the act of February 10, declaring that certain sections shall take effect immediately, and the act of February 24, declaring that none of them shall take effect until the people have voted upon them at the next general election. The first act, so far as it conflicts with the last act, or is inconsistent with it is repealed by the last. "*Leges posteriores priores contrarias abrogant.*" (*D. & L. Plank Road Co. v. Allen*, 16 Barb. 15. *Dash v. Van Kleeck*, 7

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John. 477, 497. *Colum. Man. Co. v. Vanderpoel*, 4 *Cowen*, 556. *Livingston v. Harris*, 11 *Wend.* 329. *Harrington v. Trustees of Rochester*, 10 *id.* 547.) It is the settled rule in England that where two acts passed at the same session of parliament are repugnant or contradictory to each other, the last will prevail and will have the effect of repealing the previous statute. (*Rex v. The Justices of Middlesex*, 2 *B. & Ad.* 818. *Paget v. Foley*, 2 *Bing. N. C.* 679.) This rule is the same in various states of the Union. (*Illinois and Michigan Canal v. Chicago*, 14 *Ill. Rep.* 334. *Johnson v. Boyd*, 1 *Hemp.* 434. *Quick v. White Water Township*, 7 *Ind. Rep.* 570. *Parker v. Sunbury and Erie R. R. Co.*, 19 *Penn. Rep.* 211. *United States v. Irwin*, 5 *McLean*, 178.) Therefore we say that the act of February 24, 1865, is the act under which the plaintiff's rights are to be determined. The defendant claims that the contract in suit is void under the fourth section of the act of February 10, 1865, (which is alike in both acts,) while we claim that § 11 of the act of February 24, 1865, declaring that it should not take effect until after the following November election, repealed the fourteenth section of the act of February 10, 1865, and therefore at the time this contract was made there was no law prohibiting a man from buying as many volunteers as he desired, at any price he chose to pay, unless the legislature can make parties amenable to a law before the time they declare such law shall take effect.

The constitution of 1846, (art. 7, § 12,) provides that "No such law shall take effect until it shall at a general election have been submitted to the people, and have received a majority of all the votes cast for and against it at such election." (1 *R. S.* 5th ed. 67, § 12.) Had they declared that this act should take effect immediately on its passage, it would have been clearly in violation of the constitution; therefore the declaration of the legislature at the beginning of § 11 that "it should be a law from the time of its passage," is in violation of the constitution, unless the legisla-

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ture meant that it should become a law from the time of its adoption by the people, which was undoubtedly their intention. Where an act of the legislature depends upon any future contingency, it cannot take effect or become a law until that contingency has happened. (*Savage v. Walshe*, 26 Ala. Rep. 619. 1 Kent, 9th ed. 513.) Therefore we say that the fourth section of this act under which the defendant claims this contract was void, had not taken effect and was not the law at the time this contract was made.

II. Section four in these acts provides that "No city, county or town, shall hereafter borrow or raise by tax any money for the purpose of paying bounties to volunteers, drafted men, or substitutes under the said call, dated 19th of December, 1864, or any future call, otherwise than is provided in section seven hereof, and not to exceed \$100 for hand money, and for incidental expenses for procuring each volunteer. Nor shall any city, county or town, or any individual or individuals pay any money for such purpose or purposes otherwise than as is herein provided" (except that an individual may in any way hire a substitute to exempt himself from draft, &c.)

The defendant now claims that by virtue of this act, and particularly of this section, an individual had no right to agree to pay more than \$600 for a three years volunteer, and if he did the contract was void. (a.) The language of the statute is that it shall not be paid "*otherwise than is herein provided;*" it does not say no greater amount shall be paid. (b.) It then provides that every "act, proceeding, or resolution of any board of supervisors, or of the common council of any city, or of any board of town officers, or of any officer of any county, city or town, in contravention of the provisions of this act shall be void. It does not declare that it shall be void if an *individual* violates it, nor attach any consequence to such violation. (c.) This act was not in force at the time the contract in question was made, as we have shown under the first point. (d.) If it was in force, then we

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say so far as it restricts the price an individual may pay for volunteers for the army, it is unconstitutional. The principle of the English government that the parliament is omnipotent does not prevail here, and an act of the legislature which violates the spirit of either the constitution of the United States or of this state, will be declared unconstitutional by the courts. The legislature when they attempt to prescribe the amount a man shall be at liberty to pay for an article of commerce, or how much he shall purchase, or the wages he shall pay for services rendered him, violate one of the natural rights of every citizen to use his own property as he pleases, provided he interferes with no other persons' rights. The legislature might with the same propriety say that no individual should pay more than one dollar for a coat, and he should buy only one. Or two cents for a dinner, and he should have but one during a week's time, or that he should pay his servant but a penny a day for his services. When this can be done we have indeed returned to the days of sumptuary laws, and the natural rights of the citizen are violated and destroyed by arbitrary and unrestrained legislation. This subject has been fully and ably discussed by Justice CLERKE, on a demurrer in the case. (1 *Abb. Pr. N. S.* 129.)

III. The third section of this act provides "There shall be paid to *each volunteer*, aforesaid, a sum not exceeding \$600, if he enlist for three years, &c." The defendant now claims that the agreement he made to pay the plaintiff more than \$600 for furnishing him the recruits is void. The act provides that no more than \$600 shall be paid "*to each volunteer*." It does not appear that more than \$600 was paid to any of these volunteers. At common law, before these acts were passed, an individual could pay what he pleased to a volunteer, and hire as many as he pleased, and the transaction was lawful. This act, therefore, is in derogation of the common law, and should be strictly construed. (*Smith v. Moffat*, 1 *Barb.* 65. *Sprague v. Birdsall*, 2 *Cowen*, 419.

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Bridgewater and U. Plank Road Co. v. Robbins, 22 Barb. 662. *Rathbun v. Acker*, 18 id. 393. 4 Mass. R. 145, 473.) The only prohibition in the act is as to the amount to be paid *the volunteer*, and unless it appears that the action is brought to recover a greater amount than \$600 each, which has been paid to volunteers or substitutes, the contract is valid. (*Powers v. Shepard*, 1 Abb. N. S. 129.)

S. T. Freeman, for the defendant. I. The contract upon which this action is brought, is in violation of both letter and spirit of chapter 29, of the Laws of 1865, and by the fourth section thereof expressly declared to be void. 1. It is in violation of the letter of the law. The third section of the act provides that the bounty to be paid to volunteers of the class referred to in the contract, shall not exceed the sum of \$600 each. And the fourth section provides that in addition to that amount there may be paid for the procurement of such volunteers, a sum not exceeding \$100 for each. And then it is added, "nor shall any city, county or town, or any *individual* or individuals, pay any money for such purpose or purposes otherwise than as is herein provided (except that an individual may in any way hire a substitute to exempt himself from draft.)" And then again it is added, "every act, proceeding or resolution of any board of supervisors, or of the common council of any city, or of any board of town officers, or of *any officer of any county, city or town*, in contravention of the provisions of this section shall be void." 2. It is in violation of the spirit of the law. The general object of this act is, as stated in its title, "to provide for filling the quota of men required from this state for the army and navy of the United States," and among the means by which the legislature would accomplish this object are these: *first*, to secure a uniform bounty throughout the state and to prevent volunteers from being bought up at exorbitant prices in one section of the state and credited upon the quota of other and remote sections; and *secondly*, to avoid

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the extortionate interference of that large class of fungous adventurers, who sprang up during the war, and were known as *substitute brokers*, for in addition to the provisions of the act which are above referred to, section five provided that the bounties shall be paid only to the volunteers in person, &c. and declares void certain agreements between volunteers and brokers, middlemen or agents. And it would seem also, especially from the language of the second section, that the legislature had in view the prevention of fraudulent *credits*, mere credits without the volunteers, which they purported to represent. Now the contract upon which this action is brought is evidently at variance with each of these objects. It tends to unequalize the bounties and raise the price of substitutes. It takes men enlisted in or about the city of New York, and credits them to the quota of a distant county. It countenances and encourages the extortions of the substitute broker. And it affords the opportunity for these fraudulent *credits*; notice the language of the contract—the men are to be furnished *or* credits thereof are to be procured.

II. This act of 1865, is neither unconstitutional, nor in conflict with any of those natural rights, if there are any such, which qualify or restrict legislative power. 1. The law is constitutional. And stating this as a proposition is all that need be said about it, for neither the plaintiff's counsel nor the court below point out or suggest any constitutional requirement or restriction with which this law in any degree conflicts. 2. The power of the legislature, in its proper sphere, that is, in the exercise of *legislative* power, in contradistinction to executive and judicial power, is unlimited, except by constitutional restraints or restrictions. If it were otherwise, if the courts might limit this power, by what they would call inherent natural rights, then the power must be subject to constant variations and modifications, according to the different views of different judges as to what are such rights. The difficulties and the dangers to be apprehended from this doctrine of judicial limitation of legislative power

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are suggested by Mr. Justice Comstock in the case of *Wynehamer v. The People*, (3 Kern. 391, 392.) And all the later decisions of the courts hold that legislative power can only be limited by the constitution. (See per *A. S. Johnson, J. Wynehamer v. The People, supra*; *Verplanck, senator, Cochran v. Van Surlay*, 20 Wend. 381; *Selden, J. 3 Kern. 391*; *Shankland, J. The People v. Draper*, 15 N. Y. Rep. 549; *Allen, J. Leggett v. Hunter*, 19 id. 463; *Emott, J. Bank of Chenango v. Brown*, 26 id. 469.) 3. This statute does not so conflict with any natural rights, that it should be viewed with disfavor by the courts, or construed with unwonted strictness. On the contrary it rather commends itself to the court's approbation, merits a liberal construction and demands a rigid enforcement. If in any of its features it would seem to be harsh, the peculiar exigencies under which it was passed afford a sufficient reason and an ample excuse for such as these. In times of war or of any pressing emergency, measures which would not be thought of in times of peace and quiet, become not only justifiable but often indispensable. When a pestilence rages or even threatens itself, we cheerfully submit to sanitary regulations which otherwise might be intolerably annoying. And in case of a famine or siege, I apprehend that with great propriety, men might be limited both as to what and how much they should eat and drink. When this law was passed, men had to be furnished, and furnished promptly, in response to the President's call for reinforcements. Almost every conceivable method had already been tried to fill up the quotas under previous calls. The severities of a draft were already being felt. And bounties for volunteers and the prices of substitutes were running up to such figures as were entirely beyond the reach of men of ordinary means. Now the evident purposes of this law were not only to reinforce the armies of the nation and thus support the government, but in addition thereto to relieve and protect the citizen and render equal assistance to rich and to poor in escaping from the terrors of a conscription. The

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legislature proposes to remove the burden from the shoulders of the comparatively few, upon whom it may chance to fall, and to distribute it equally, so that all may bear a part. 4. This statute does not assume to fix or limit the amount which any particular person shall pay for a substitute, but it expressly excepts any such restriction. (§ 4.) It merely provides that volunteers to be credited to particular counties, cities or towns, and middlemen or brokers procuring such volunteers, shall be paid no more than a certain amount therein specified. And these provisions exactly apply to the contract in suit.

JAMES C. SMITH, J. It is insisted upon by the defendant's counsel that the agreement sued on is in violation of the fourth section of chapter 29 of the laws of 1865. The first three sections of the statute referred to provide for the payment of a state bounty to volunteers furnished from this state as in said act provided, in order to fill the quota of the state under the call of 19th December, 1864, and also under any subsequent call, during the war then existing, such bounty not to exceed the sum of \$600 to a volunteer for three years, \$400 to one for two years, and \$200 to a volunteer for one year. The fourth section provides that no city, county or town shall thereafter borrow or raise money for paying bounties to volunteers under said call, or any subsequent call, otherwise than as is provided in the seventh section of said act, and not to exceed one hundred dollars for hand money and incidental expenses for procuring each volunteer; "nor shall any city, county or town, or any individual or any individuals, pay any money for such purpose or purposes, otherwise than as is in said act provided, (except that an individual may in any way hire a substitute to exempt himself from draft.") The seventh section amends section 22 of chapter 8. of the laws of 1864, which in its original form authorized the raising of money upon the credit of towns and counties for the purpose of paying local bounties to volunteers. By the

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amendment a proviso was added, to the effect that the bounties raised, paid or offered under the provisions of that section, shall not exceed in amount the state bounties provided for by said act of 1865. One of the objects specified in the title of the last mentioned act is "to prohibit any local bounties to volunteers," drafted men or substitutes.

The intent of the prohibitions and restrictions contained in section four, seems clear. They were designed to prevent the serious mischiefs resulting from an unrestricted competition between different localities, in respect to bounties, which we may know judicially, as matter of public history, were widely and severely felt by the people of the state before the passage of the act referred to. Under the stimulus of such competition, extravagant local bounties were offered and paid, on every hand; an enormous load of debt and taxation was about to be rolled up to be borne by the people of the towns and counties upon whose credit it was incurred; and this very extravagance of expenditure tended to defeat the object of offering bounties, and to impede the recruiting of the army, by appealing without stint to the cupidity of men and inducing them to delay volunteering, in the hope of getting a still larger bounty at a later day. The act in question tended directly to repress these mischiefs.

The plaintiff's counsel argues in view of the peculiar language of the restriction that it was not intended to limit the amount to be paid for bounties. The language is, "nor * * pay any money * * otherwise than is herein provided," and this, it is urged, does not restrict the amount. The idea is naturally suggested by the form of expression used, which is not apt, but obviously, such is not the meaning. If the restriction does not relate to the amount, it can only refer to the mode of raising money for bounties; and it applies, in terms, to individuals, as well as to towns and counties. But under section 22 of the act of 1864, individuals could not raise money in the mode prescribed by that section, and towns and counties could not raise it to pay bounties, in any other

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mode. So that, upon the plaintiff's construction, the restriction would be inapplicable to individuals, and nugatory as to towns and counties. Besides, it would not meet any of the mischiefs already adverted to.

The construction contended for by the plaintiff's counsel is not aided by the circumstance that the last clause of section four expressly declares void all acts of county, town and city officers in contravention of the provisions of that section, and does not declare void the acts of individuals violating those provisions. That clause is declaratory merely. As the officers referred to had power under section 22 of the act of 1864, to raise money in the mode thereby provided to pay bounties, to an unlimited amount, and would continue to have the same power within the limits fixed by section four, it was expedient if not necessary to declare expressly that the exercise of such power in excess of the prescribed limits would be void; but such declaration was not needed in respect to the acts of individuals, as they derived no powers from the former statute, and their acts in violation of the later statute would be void without an enactment to that effect, by force of the common law. (1 *Kent*, 518.)

The plaintiff's counsel also claims that the agreement in suit is not within the prohibition of the act, as it does not provide for the payment of any sum whatever to a volunteer. But it requires the payment of a stipulated sum to the plaintiff in consideration of his procuring a certain number of volunteers to the credit of the plaintiff's town, and the sum stipulated by the two contracts exceeds the rate of 600 dollars for each man. By the contract, the plaintiff becomes a middleman, or recruit broker. It enables him to go into the market, and pay sums exceeding the amounts fixed by law as bounties for volunteers, and to retain a liberal profit to himself. That was the actual result in the present case. According to the testimony of the plaintiff himself, he paid \$830 for the men, not to the men themselves, but to those who shipped them. If the transaction is valid, the statute is a dead letter.

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The agreement is just as obnoxious to the policy of the act, as if it had stipulated that the sums expressed should be paid directly to the volunteers. It has the same tendency to create and foster the unhealthy competition which the statute was intended to suppress. It is an attempt to evade the statute, and consequently it is void, if the statute is valid.

This brings us to the consideration of the other positions taken by the plaintiff's counsel. First, that the restriction in section four is unconstitutional, and secondly, that it did not take effect till after the agreement sued on was made.

Respecting the constitutionality of the act, no question could have been entertained, but for the opinion delivered by the learned judge who decided this case at special term, on a demurrer to the complaint. (1 *Abb. N. S.* 129.) He held the act unconstitutional, and placed his decision upon the ground that the legislature have no power to prescribe to the citizen what price he shall pay for a substitute in the army. It will be observed, however, that the act expressly permits an individual to hire a substitute, in any way, to exempt himself from draft. It restricts individuals, only so far as is necessary to prevent the mischiefs at which the act was aimed. With all due respect, I conceive that the power of the legislature to adopt such restriction cannot be successfully questioned. The measure is clearly within the exercise of their undoubted power to provide for raising men to fill the quota of the state.

The remaining question is whether section four of the act took effect before the agreement was made. The agreement is dated the 9th of March, 1865. The act, (*ch.* 29,) was passed the 10th February, preceding, and it expressly provided that each of its sections should take effect immediately, except the eighth, ninth and tenth. Those sections authorized the creating of a state debt not exceeding \$30,000,000, for the purpose of raising the means of paying the bounties provided for by the act, the bonds of the state to be issued to obtain the money, and the debt to be paid by tax,

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the interest annually, and the principal in eighteen yearly installments. The eleventh, twelfth and thirteenth sections provided for submitting the question of the debt to the people at the next general election. On the 24th of February, 1865, the legislature passed another act, entitled "An act to provide for filling the quota of men required from this state for the army and navy of the United States, and to amend section twenty-two of chapter eight of the laws of 1864, and to regulate local bounties to volunteers, drafted men or substitutes." (*Ch.* 41.) The act consisted of eleven sections. The first seven were a transcript of the first seven sections of the act of February 10. The eighth appropriated not exceeding \$30,000,000 for the purpose of paying the bounties provided for by said act; the ninth provided that a state tax be levied not exceeding two *per cent per annum*, to be devoted to restoring to the treasury the money so appropriated; and the tenth section authorized the comptroller to anticipate such tax by borrowing from any funds in the treasury, upon the credit of the general fund, the necessary sums to carry out the provisions of the act. The eleventh section furnishes the key to the construction of the first act, and is in these words: "This act is hereby declared to be a law from the time of its passage; but it shall not take effect until after the canvass of the votes by the state canvassers next after the next general election, and if it should then appear at such canvass that a majority of the votes cast at such election upon the question of creating a state debt for the purpose of raising money to pay bounties for the purpose of filling the quota of men called for from this state under the said call of December 19, 1864, passed February 10, 1865, has been against creating such debt, then the said board of state canvassers shall at once, upon completing such canvass, certify that fact in writing to the governor; and the governor shall at once, upon being so certified, issue his proclamation declaratory thereof, and from the day of issuing such proclamation this act shall take

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effect. But if, in making such canvass, it shall appear that a majority of the votes cast upon the said question have been for creating the said debt, then the said board of state canvassers shall at once, in writing, certify that fact to the governor, and the governor shall at once, by proclamation, make public such result ; and this act shall not then take effect until after the adjournment of the next legislature."

The first seven sections of the two acts being in precisely the same language, the plaintiff's counsel argues that the provision of the later act that those sections should not take effect till after the canvass, or till after the next session of the legislature, as the case might be, was an implied repeal of the provision of the first that they should take effect immediately. The construction is ingenious, but I think it is not sound. The two acts had a common object, to wit, to raise moneys to pay bounties for the purpose of filling the quota of the state, but their modes of accomplishing the object were entirely different. The plan of the first was to provide for raising the money by creating a state debt under the twelfth section of the seventh article of the constitution which requires a submission to the people. The scheme of the second act was to provide for the contingency of a failure to obtain the requisite vote to ratify the plan of the first act, by appropriating from the state treasury the sum needed for bounties and levying a tax of two per cent to be applied to restoring in part the sum so appropriated. The latter act did not contemplate or require the repeal, suspension or abandonment of the former ; on the contrary, the former was to be tried, and if ratified by the people, it was to be carried out. Here, then, were two distinct plans, of each of which the first seven sections referred to were a part. As a part of the plan created by the first act, they were to take effect immediately after its passage, but as a part of the plan of the later act they were not to take effect till after the canvass. As a part of chapter 29, they had at once, and continued to have, the same effect, in all respects, as if chapter 41 had

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not been enacted. This is made more apparent by chapter 56 of the laws of 1865, passed February 27, which provides, among other things, that a state tax of two per cent be levied for the next fiscal year, to raise means to pay the bounties directed to be paid by chapter 29, and authorizes the comptroller to issue bonds of the state in anticipation of the said tax, for the purpose of raising the money required for such bounties without delay, and also directs that if chapter 29 be approved by the people at the next election, said tax shall not be collected, and said bonds shall be paid from the proceeds of the stocks authorized by chapter 29.

The plaintiff's counsel claims further, that the effect of chapter 29 is postponed by the operation of its own section 11, which provides that "*this act shall be submitted to the people at the next general election.*" The argument is, that the entire act is submitted, and, therefore, the effect of the whole is postponed till the result of the election is declared. The true construction of these words is, that only so much of the act is submitted as provides for the debt proposed to be created. That is all that it was necessary to submit, to accomplish the object of the act, and it is all that the legislature could properly submit to the people. (*Barto v. Himrod*, 8 N. Y. Rep. 483.) This construction makes sections 11 and 14, of chapter 29, consistent with each other, as to the time when the different provisions of the act shall take effect.

It may also be remarked, that the provisions of section 4, of chapter 29, may stand alone, even if all other parts of that act fail. The limitations which it imposes upon local bounties, have no necessary connection with the plan to create a fund for a state bounty.

For these reasons, I am of opinion the defendant is entitled to judgment on the verdict.

LEONARD, P. J. If it be held that section 11, chapter 41, of the laws of 1865, suspends the operation of chapter 29, of the same session, then the latter chapter will become nuga-

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tory ; as it will be seen that, in case the people voted against the loan, chapter 41 then came into operation ; and should the vote be for the loan, the same chapter was also to take effect at a future period ; the governor, in either case, having first issued his proclamation declaratory of the result. Which ever way the vote resulted, chapter 41 would eventually become operative ; and if chapter 29 be suspended in the mean time, the seven sections which were identical in the two chapters, would never necessarily have any operation under the suspended act. This construction is equivalent to holding chapter 29 to have been repealed.

The existence of chapter 29 could not have been overlooked by the legislature, when the later act followed the former by the lapse of two weeks only. Nor is it probable that the repeal would have been left as the result of a legal implication, had such been the intention of the legislature.

It is agreed by my brother judges, in this case, and I concur, that the identity of the first seven sections of the two chapters does not effect a repeal of those sections in the first act. That the first act was not to become inoperative, according to legislative intention, is further confirmed by the enactment of chapter 56, by the same legislature, on the 27th February, a few days later only than the date of chapter 41, which was declared to be a law from the time of its passage, although the period when it was to go into effect was postponed.

Chapter 56 contemplates the payment of bounties directed by chapter 29, and provides for raising the money temporarily for that purpose by the comptroller, to be redeemed from the proceeds of a direct tax of two per cent, or from the proceeds of the loan, in case the people accepted that plan as proposed by chapter 29.

The construction that holds chapter 29 to be suspended, leaves no authority in force until several months have elapsed, (the election of the following November,) for the payment of bounties by the state ; and thus the operation of a subsequent enactment (chapter 56) is also suspended, so far as it con-

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templates an immediate expenditure of money from the treasury for that purpose.

These views make it entirely clear to my own mind, that it was the intention of the legislature that chapter 29 should be considered in full force, notwithstanding the enactment of chapter 41. The declaration, that chapter 41 is a law from the time of its enactment, also favors, in some degree, this construction, inasmuch as it would otherwise be inconsistent that similar provisions, contained in a former chapter, should be in operation as a law during the period when by chapter 41 they were not to take effect.

The conclusion is thence derived, that the contract sought to be enforced by this action, contravened the provisions of chapter 29, forbidding the payment of bounties above the prescribed amount, and is, therefore, void.

The point that the contract is not with a volunteer, nor for the payment of bounties, is not available. The policy of the law is destroyed by permitting contracts for procuring volunteers by the payment to any one of an amount beyond the sums prescribed by the act for bounty and hand money.

The defendant is, therefore, entitled to judgment upon the exceptions.

INGRAHAM, J. (dissenting.) There is nothing in the contract itself to impair its validity, and the only ground upon which it is claimed that the contract is void is, that it is in violation of the provisions of the law of 1865, (chapter 29.) The act of the legislature referred to, provided for a payment by the state of the sum necessary to procure volunteers, and authorized the issue of a stock for that purpose. It also provided, in the 3d section, for the payment to each volunteer of six hundred dollars if he enlisted for three years, and a less sum for a shorter term of service. In the 4th section, "any city, county or town, or any individual, was prohibited from paying any money for such purposes otherwise than as therein provided, and no city, county or town could borrow or raise,

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by tax, any money for the purpose of paying bounties, &c. except as provided in section 7 of the act, and not to exceed one hundred dollars for hand money and incidental expenses for procuring each volunteer." The 7th section authorized the board of supervisors to raise money for this purpose of paying bounties and paying the incidental expenses, and limited the amount to be raised to six hundred dollars for three years men, and lesser sums for shorter terms. It was also provided for submitting to the people this act for their approval, and the last section directed that the 3d, 4th, 5th, 6th and 7th sections should take effect immediately, but the 8th, 9th and 10th sections (providing for a loan) should not become a law until ratified by the people.

On the 24th February of the same year, (chapter 41,) the legislature passed another act containing these sections, in the same words as in chapter 29, with other provisions, and providing for the submission to the people of the last act, and containing in the 11th section the following provisions, viz. that the act should be a law from the time of its passage, but should not take effect until after the canvass of the votes next after the next general election; that if it should appear at such canvass that a majority of the votes cast were against creating the debt, the state canvassers should so certify to the governor, who was to issue his proclamation, and the act should take effect from the day of issuing the proclamation. If a majority of the votes were for creating the debt, the same was to be certified as before, but the act should not take effect until after the adjournment of the next legislature. Or, in other words, if the people did not approve of creating the debt, the act should take effect at once, and if they did approve of such debt, then the act should not take effect until after the session of the next legislature. Under either provision, however, this act was not in force at the time of the making of this contract, and its provisions have no effect thereon. There is nothing in the act directly repealing the former act, (chapter 29,) and the mere re-enactment of the

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provisions of that act cannot be construed as a repeal thereof. We are, therefore, left to decide this case upon the provisions of chapter 29, so far as they were in force when the contract was made, unless the 11th section of the act, chapter 41, is to be construed as suspending the operation of the sections of chapter 29, incorporated therein. That section provided that none of the previous sections should in any event take effect until after the November election; that is, that the provision therein limiting the amount to be paid to a volunteer and for hand money, and which was in fact the same provision as was contained in section 4 of chapter 29, should not take effect until after the November election. I think the fair construction of this section is, that the legislature intended that these sections, and the enactments contemplated therein, should be suspended until after the people voted thereon. The object of submitting it to the people was to obtain their assent to a loan, and unless such loan was obtained, it was not deemed advisable in that act to restrain the payment of any sum to obtain volunteers, until after the vote of the people. If, notwithstanding, it should be held that the act (chapter 29) was in force, it would be in conflict with the provisions of the 11th section of the 41st chapter, and would render nugatory the provisions suspending the operations of the same sections as contained in the latter act. The two acts must be read together, and effect given to the provisions of both, as if they were incorporated in one act, and in such a manner as not to render either a nullity. Such a result can be attained by holding that those sections in the act chapter 29, which were incorporated into act chapter 41, and there re-enacted, are controlled in their operation by the provisions of the last act; and if so, then they were not in operation when this contract was made.

I do not concur in the opinion that the legislature could not limit the amount to be paid for volunteers. They had the power of prohibiting any but drafted men from being received in the army, and having that power, they might also

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say that a limit should be placed on the sums to be paid for substitutes.

For the reasons, however, first stated, I think that at the time of making this contract there was no limitation in force, and that judgment should be rendered in favor of the plaintiff, upon the verdict.

Judgment for the defendant.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Ingraham and J. C. Smith, Justices.*]

MCREADY & MOTT vs. THORNE and others.

Where a vessel is run by the master, on shares, it is not a chartering, nor does the master become owner, for the time being; and parties dealing with him are justified in considering him clothed with the usual authority of a master; especially where one of the owners indorsed the action of the master, in dealing with such parties, before they gave him credit.

Under such circumstances, the master can bind the vessel and her owners, for supplies and necessaries furnished.

Where the master testifies that money advanced to him, and expended, by the plaintiffs, was for the account of the vessel; that the plaintiffs rendered him an account, and he certified it to be correct; the mere fact that he is unable to state, after the lapse of several years, what the money was expended for, will not weaken the force of such testimony.

THE plaintiffs, who were ship brokers in the city of New York, in the latter part of 1855, advanced certain cash to the captain of the schooner "Susan Orleans," then lying in the port, to enable him to pay the port charges of his vessel; and they also paid sundry bills against the vessel, and rendered personal services for said vessel, at the captain's request. The "Susan Orleans" was at that time owned by the defendants, one of whom, Charles E. Thorne, who lived in New York, was the *ship's husband*; the other owners

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residing in New Jersey. The indebtedness to the plaintiffs was incurred at the instance of said Thorne, and upon an express promise made by him, as one of the owners, that the *owners of the vessel* should be responsible for it. The whole of the money advanced by the plaintiffs to the captain was used by him in defraying *port charges* of the vessel, and nearly all the other items of the plaintiffs' account were also *port charges*. The vessel, at the time the plaintiffs' account was run up, was let by the owners to the captain, on shares, the captain agreeing with the owners to victual, and man and sail the vessel at his own expense, to *pay port charges out of the earnings of the vessel*, and then to divide the balance of her earnings between himself and the owners, in equal moieties. The special contract between the master and owners of the vessel was, however, entirely unknown to the plaintiffs at the time the indebtedness accrued. After the return of the vessel from her contemplated voyage, the captain duly accounted with Thorne as one of the owners and ship's husband, for her earnings.

The action was tried before a referee, who, in his report, allowed the plaintiffs only for the items of the account which were established to be *port charges*.

From the judgment entered upon said report, the defendants appealed.

I. T. Williams, for the appellants.

J. S. Jenness, for the respondents.

By the Court, LEONARD, P. J. It appears from the evidence, that Capt. Cathcart *run* the schooner Susan Orleans on shares with the defendants, who were the owners, but the plaintiffs were ignorant of the arrangement. The referee has so found the facts. The defendant Thorne made this agreement with Capt. Cathcart, acting for himself and

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the other two defendants, who were also part owners, and resided in the interior, at some distance from the port of New York, where the vessel lay and Mr. Thorne resided. The other owners expressed no dissent to this employment of the vessel, and they are therefore to be deemed as concurring, and are liable for their share of the expenses, and entitled to a share of the profits. (*Gould v. Stanton*, 16 Conn. R. 12.)

Where a vessel is run by the master, on shares, it is not a chartering, nor does the master become owner for the time being. The plaintiffs were justified in considering him clothed with the usual authority of a master, especially as Mr. Thorne indorsed the action of the captain in dealing with the plaintiffs, before they gave him credit.

Under these circumstances the master can bind the vessel and her owners for supplies and necessaries furnished.

Captain Cathcart testifies, in substance, that the money advanced to him, and expended, by the plaintiffs was for the account of the schooner. The plaintiffs rendered him an account, and he certified it to be correct. There is nothing calling this evidence in question, except the failure to be able to state, at the time he testified, after the lapse of several years, what the money was expended for. The fact that he certified to its correctness, when the account was fresh in his recollection, is pretty good warrant for him to testify that the money was advanced by the plaintiffs for the account of the schooner, and sustains the facts, in this respect, as found by the referee. The items are such as to indicate a probability that they were necessary expenditures, so far as the articles were paid for directly by the plaintiffs. How the captain expended the money paid to him by the plaintiffs, is not detailed; but the disbursement of it for the vessel, made by him, is not impeached, except by his inability to state it, as before remarked.

There appears to be an error in the computation of interest, amounting to \$9.40. This amount the plaintiffs must remit.

Benjamin v. Elmira, Jefferson and Canandaigua R. R. Co.

The judgment should be reversed, and a new trial had before the referee, unless the plaintiffs within twenty days remit the said sum ; and in the event of their so remitting the amount, the judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Sutherland and Ingraham*, Justices.]

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SIMEON BENJAMIN, OLIVER PHELPS and EBEN SMITH, *vs.*
THE ELMIRA, JEFFERSON AND CANANDAIGUA RAILROAD
COMPANY.

A mortgage given by a railroad company to secure the payment of its bonds, a bond issued by the company, and a certificate indorsed thereon, stating that such bond is included in the mortgage, are all to be construed together, as parts and parcels of the same security.

A mortgage, executed by a railroad company upon its railroad, with the lands, tracks, buildings, privileges and franchises, "together with all the locomotives, tenders, cars, carriages, tools and machinery owned or *hereafter to be owned* by the company, or in any way belonging to or appertaining to said road and to be used thereon," is valid in equity, in respect to subsequently acquired property; and a decree in a suit brought to foreclose the same, declaring such to be its effect, and directing a sale of all the property embraced therein, is a conclusive adjudication upon that point, against all persons, parties or privies in that suit.

Persons made parties to a foreclosure suit as subsequent incumbrancers by judgment or mortgage, whose rights were already acquired, and existed at the commencement of the suit, are bound to set up their claims and assert their rights, in that action, at the peril of being cut off and foreclosed, in respect to such claims.

But if the decree in such action were not binding upon persons made parties as subsequent incumbrancers, the decision of the court upon questions raised and litigated by other parties, as to the validity and effect of the subsequent incumbrances, is *res adjudicata*, and the question cannot be again litigated, while such decision remains unreversed.

If individuals are made parties defendants to a foreclosure suit as subsequent incumbrancers, that is sufficient, as respects the conclusiveness of the decree therein, whatever may be the nature of their liens. It is of no consequence that the plaintiff has made them parties as judgment creditors, when they hold a chattel mortgage upon the property.

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A PPEAL from a judgment entered upon the report of a referee. The action was brought to recover the value of certain personal property, consisting of railroad locomotive engines, cars, machinery and fixtures, claimed to belong to the plaintiffs, and alleged to have been converted by the defendants, and of the value of \$32,000.

The defendants, by their answer, *First*, admitted that they were an incorporation, (under the general railway act, incorporated February, 1859,) but denied each and every other allegation in the complaint contained.

Second. They alleged that they derive title to the property in the complaint set forth, under and by virtue of a purchase thereof made by them, for the full value of said property, in good faith, and without notice of the plaintiff's title or claim herein, from Charles Congdon and Robert B. Potter, in February, 1859, and that such purchase was made and the consideration therefor paid, with the knowledge and assent of the plaintiffs, and without any notice, suggestion, assertion or claim by them that the said Potter and Congdon had not perfect title to said property, or that the plaintiffs had any claim thereto, or interest therein, whatever.

Third. That in the year 1857, Shepherd Knapp and William H. Townsend, trustees, and Septimus Crooks, brought their certain action in this court, against the Canandaigua and Elmira (formerly called Canandaigua and Corning) Railroad Company, and others, to foreclose a certain mortgage, dated July 2d, 1850, made by that company to the said Knapp and Townsend, trustees, and claiming, among other property, that claimed by the plaintiffs herein, in which action the plaintiffs herein were duly served with process and made parties defendant. That in said action such proceedings were thereupon duly had, that on the 18th day of May, 1858, the said court, among other things, duly ordered, adjudged and decreed that the defendants in that action, and each and every of them, and all persons claiming, or to claim, from, by, through or under them, or either or any of them,

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and all persons having a lien subsequent to said mortgage, dated the 2d day of July, 1850, whether by the subsequent mortgages set forth in the complaint in that action, or by judgment, decree or otherwise, upon the mortgaged premises and property claimed in that action, and all persons claiming, or who might claim, from or under the defendants in that action, or any or either of them, be, and they were thereby forever barred and foreclosed of and from all equity, and all manner of right of redemption and claim of, in or to said mortgaged premises and property, and every part and parcel thereof, which said mortgaged property embraced the property claimed in this action.

That under and by virtue of such judgment, the property in the complaint mentioned was duly sold, and that the same was duly purchased on the 23d day of July, 1858, by parties from whom these defendants took title, and that such purchase was made, and the consideration therefor paid, with the knowledge and assent of the plaintiffs, and without any notice, suggestion or claim made or asserted on their part, of any title to, or right in the said property in the complaint mentioned.

Fourth. That on or about the 24th day of January, 1861, the defendants purchased, for a valuable consideration, the said property claimed in the complaint herein, of the Elmira, Canandaigua and Niagara Falls Railroad Company and paid therefor. And that such purchase was made by the defendants in good faith, with the knowledge and assent of said plaintiffs, for a valuable consideration, and without any notice, suggestion or claim made or asserted on their part of any title to or right in the property in the complaint therein mentioned. And that the plaintiffs, or some of them, were interested in the consideration paid on such last mentioned sale for the property now claimed by them herein.

Wherefore the defendants claimed and insisted that the plaintiffs of any claim or title they had to the said property in the complaint mentioned or any thereof, were wholly barred,

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foreclosed and estopped in law, equity and conscience from setting up or asserting the same herein. And they demanded judgment herein against the plaintiffs, with their costs, &c.

The facts were as follows : The Canandaigua and Corning Railroad Company was incorporated in 1845, and its name changed in 1850 to Canandaigua and Elmira Railroad Company, by which latter name it will herein be designated. It was the first of three railroad companies which have possessed the line. This first company executed a mortgage dated July 2d, 1850, to secure \$300,000 of bonds, which embraced the road, locomotives, cars, shop machinery, &c. of the company, acquired and to be acquired. Each bond so issued had a certificate indorsed thereon, stating that such bond was included in the mortgage. Afterwards the company executed its second, third, fourth and fifth mortgages, each to secure further issues of bonds, and each subject in terms to the lien of the first mortgage. In June, 1855, the company executed a chattel mortgage to its directors, (which included the plaintiffs,) to secure them for liabilities incurred on its behalf; and this mortgage was followed by a new mortgage in June, 1856, embracing the same and some additional property, which is the property mentioned in the complaint; and the other directors subsequently transferred their interests to the plaintiffs and one James Harris. For default made August 2, 1855, on the third mortgage, suit was commenced, the company's property sequestered, and a receiver appointed in September, 1856, and the road and mortgaged property sold to one Holmes, from whom it was transferred to the Elmira, Canandaigua and Niagara Falls Railroad Company, the second railway company which possessed the line; of which company Mr. Diven was president—called therefore frequently "Diven's Company." Thereafter, for default on the first mortgage, suit was commenced in July, 1857, and a receiver of the property appointed. This suit was contested by the Diven company, on the ground, among others, that the first mortgage did not embrace and hold the rolling stock.

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The plaintiffs here were defendants in that suit, but did not appear and defend. Judgment was ordered against them "that they may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged premises and property, and every part and parcel thereof." Judgment having been rendered in favor of the holders of the first mortgage, the property was accordingly, in July 1858, sold. The sale embraced the rolling stock, shop machinery, &c. included in the plaintiffs' chattel mortgage; and they forbade it. All the property was bought by Congdon and Potter, and subsequently conveyed for value to the defendants, who are the third company which has possessed the line. Diven's company appealed from the judgment in the first mortgage case, and that judgment was affirmed. That company then moved for a new trial, which was denied, and then in June, 1860, made a settlement with the first mortgage holders and their assignees, the defendants here, by which it was arranged that the property should be appraised, and three fourths in value set off to the defendants here, and one fourth to Diven's company, and the litigation thus settled. The property was accordingly appraised, the division made, and releases executed. By this division, the mortgaged engines and cars were set off to the defendants here, and valued and set off as if free of the present plaintiffs' chattel mortgage. The defendants claimed that the plaintiffs knew of the division, and some of them were interested in it, but they made no objection to it, and asserted no claim under their mortgage. In April, 1859, these defendants had leased the railroad to the Erie company, with the privilege of taking the rolling stock with the road, on certain conditions to be complied with; meantime it remained in the shops at Canandaigua. In July, 1861, the plaintiffs demanded the rolling stock from Rathbun, a director of the defendants at Elmira, who referred them to a superintendent, of whom also, they demanded it, who declared that he had no control over

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it and referred them to certain officers of the company; whereupon they brought suit.

The referee found as conclusions of law : *First.* That the said mortgage of the Canandaigua and Elmira Railroad Company embraced and was a valid and subsisting lien on the property mentioned in the complaint in this action prior and superior to the lien created by the mortgages to the plaintiffs herein, and that under the judgment and proceedings in the action to foreclose that mortgage, such property (excepting only the particular articles in the findings and facts therein twenty-seventhly mentioned) was duly sold and became the property of the purchasers at such sale, and those claiming under them.

Second. That the said third mortgage of the said Canandaigua and Elmira company also embraced and was a valid and subsisting lien on the property claimed by the plaintiffs herein, prior and superior to the lien created by the mortgages to the plaintiffs in this action, and that under the judgment and proceedings in that action, the same was duly sold and became the property of the said George B. Holmes, and on the sale by him the property of the said Elmira, Canandaigua and Niagara Falls Company subject to the lien of such first mortgage.

Third. That the plaintiffs herein were duly made defendants to the said action brought by Knapp and Townsend, trustees, to enforce said first mortgage, and that by the foreclosure therein, they became and are barred and estopped from contesting the validity of said mortgage, and the superiority of the lien thereof, and of the title acquired thereunder, over their title or right to the property mentioned in the complaint in this action.

Fourth. That the said mortgages to the plaintiffs having been given in contemplation of the insolvency of the said company, were void as against the creditors of that company and those claiming under them.

Fifth. That the plaintiffs herein, and their associates, were

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not as against the prior mortgages of the Canandaigua and Elmira company, and those claiming under them, *bona fide* mortgagees for the value of the property embraced in the mortgages to them (said plaintiffs herein.)

Sixth. That the property in the complaint mentioned was not the property of the plaintiffs herein, as alleged, nor were they entitled to the possession thereof, nor has the same been wrongfully converted by the defendants herein.

Seventh. That the defendants were entitled to judgment in this action.

Judgment being entered accordingly, the plaintiffs appealed.

E. P. Hart, for the appellants.

C. N. Potter, for the respondent.

By the Court, E. DARWIN SMITH, J. The conclusions upon the law, of the learned judge who tried this cause as a referee, upon the facts found by him, I think entirely correct. The decree upon the foreclosure of the mortgage of \$300,000, given to Knapp & Townsend as trustees, &c. is, I think, binding and conclusive, as an adjudication, upon the defendants in respect to the subject matter in controversy in this action. The mortgage, mortgage bond, and the certificate thereon indorsed, referred to in said decree, are all to be construed together. They are parts and parcels of the same security. By the mortgage, the mortgagors grant, bargain, transfer and set over to the said trustees, the party of the second part, "all and singular the railroad constructed and to be constructed, with the lands, tracks, lines, bridges, way buildings, piers, privileges and franchises, together with all the locomotives, tenders, cars, carriages, tools and machinery now owned, or *hereafter to be owned*, by said company, or in any way belonging to or appertaining to said road and to be used thereon, between Canandaigua and Jefferson." This

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mortgage was clearly valid in equity in respect to subsequently acquired property, and the decree of this court declaring such to be its effect, and directing the sale of all the property embraced therein, is a conclusive adjudication upon that point, against all persons, parties or privies in that suit. The plaintiffs in this action were parties defendant in that suit; their rights were all acquired and existed at the time of its commencement. They were made parties as subsequent incumbrancers by judgment or mortgage. It was alleged in the complaint that their several judgments, mortgages or other claims were subsequent and subordinate and inferior to the said first mortgage, and the lien, incumbrance, claim and effect thereof, as to all the property, real and personal, then or thereafter, of the said railroad company. If there is any thing in the principle that when a party is brought into court and given an opportunity to present his claims and contest the rights asserted against him, he must do so at the peril of being cut off and foreclosed in respect to all such claims, the plaintiffs are clearly estopped from going back of this decree. They were subsequent incumbrancers upon the property in question. They were called upon to set up their claims and assert their rights, and omitted to do so, and suffered the plaintiffs in that suit to take the said decree and proceed to execute the same.

But if this decree were not binding upon them as an adjudication, the decision of this court upon the questions presented in that case and raised and litigated by the Elmira and Canandaigua and Niagara Falls Railroad Company on the express ground that said mortgage did not bind or hold the rolling stock of said Canandaigua and Elmira company, nor its property acquired after the date of the mortgage, is *res adjudicata*. This question was then litigated, and this court decided the question, at general term, in favor of the plaintiff. (*See MS. opin. of court in case of Knapp v. Can. and Elmira R. R. Co. 1859.*) The question presented on the argument, of the construction and form of the

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said mortgage is therefore not an open one, in this court. That judgment remains unreversed, and we see no reason to overrule the decision then made upon the question. It is suggested that the said judgment and decree is not conclusive, because the plaintiffs were made parties as judgment creditors. I do not think this position at all tenable. The plaintiffs were made parties as subsequent incumbrancers. It matters not what their liens were; they had an opportunity to set them up and litigate the question in that suit. It is of no consequence that the plaintiffs made them thus parties as judgment creditors, and in ignorance of their chattel mortgage. The plaintiffs in this suit were not ignorant of the existence of their own mortgage, and they knew that the plaintiff in that suit claimed a prior lien upon the property in question therein, and were seeking to enforce it against them and all subsequent incumbrancers, or to cut off all subsequent liens of whatever nature.

Being quite clear in the opinion that these plaintiffs are estopped from going behind this decree to bring into discussion anew the question of the original construction of the said mortgage to Knapp & Townsend, foreclosed thereby, I have not thought, and do not think, it necessary to discuss the other question raised upon the argument. I will say, however, that I think the case, upon the whole, was properly disposed of by the referee, and that his conclusion upon the whole case is correct and sound.

The judgment should be affirmed, with costs.

Judgment affirmed.

[MONROE GENERAL TERM, June 8, 1867. *Wells, E. D. Smith and Johnson*, Justices.]

SCHUSTER vs. THE METROPOLITAN BOARD OF HEALTH.

The defendants, by an entry upon their records, declared that the premises of the plaintiff, and the business pursued therein conducted, in their opinion, and in fact, were in a condition dangerous to life and health; and a public nuisance, and ordered that the business of slaughtering animals on the said premises be abated and discontinued, &c. The order was directed to be served as required by law, and executed by the Board of Metropolitan Police. The defendants subsequently passed another ordinance, declaring that the slaughtering of animals should not be permitted or conducted after the 15th of June, 1887, at any place in the city of New York south of 42d street; nor at any place north of that street, nor in the city of Brooklyn, without a special written permit.

The evidence showed that the plaintiff's premises were well sewered, and the business of slaughtering was conducted there by the plaintiff with the greatest care and cleanliness it was capable of, and that it was not, in this case, in fact a nuisance; and nearly all of the neighbors of the plaintiff, for a considerable distance, united in declaring, in writing, that the premises were not offensive, annoying or prejudicial to health, and in requesting the defendants not to interfere with the plaintiff in the prosecution of his business. The evidence also proved, as a fact, that the slaughtering of animals could be so regulated and conducted as not to be in any case a nuisance, or prejudicial to the public health.

Held that the defendants were clearly exceeding any authority conferred upon them by the laws, in attempting to declare any thing to be a nuisance which is not such by the common law. And that they should be restrained by injunction from enforcing the said ordinance against the plaintiff as the proprietor of a nuisance, and, until the hearing and disposition of the case, from interfering with his business, except for police inspection and regulation.

While the inspection and regulation of pursuits in a large city, which are liable to become injurious to the public health and safety, are within the police powers lawfully delegated to, and exercised by, local and municipal corporations, the power to suppress such pursuits, when they have been immemorially exercised, is wholly beyond and above the police powers, and extends into the domain of legislative function. *Per* LEONARD, J.

The Metropolitan Board of Health, holding office by the appointment of the governor, and not being elected by the people of the city of New York, nor appointed by any power so elected, are not officers holding from a source permitting the exercise of local legislation to be conferred on them.

The decision in *The People v. The Board of Metropolitan Police*, (33 *How. Pr.* 52; 48 *Barb.* 524,) approved.

MOTION for an injunction. The facts appear in the opinion of the court.

Schuster v. Metropolitan Board of Health.

James M. Smith, for the plaintiff.

D. B. Eaton and *Geo. Bliss*, for the defendants.

By the Court, LEONARD, P. J. On the 16th of May, 1867, the defendants, at a meeting of the board, entered upon its records that the premises of the plaintiff, and the business pursuit therein conducted, in their opinion, and in fact, were in a condition dangerous to life and health and a public nuisance, and ordered that the business of slaughtering animals on the said premises be abated and discontinued, thoroughly cleansed, and all fifth removed. The board directed the order to be served as the law required, and executed by the Board of Metropolitan Police. That its execution be not commenced until the further order of the board. This order was made without notice to, or a hearing on the part of, the plaintiff. The law, however, authorizes a reconsideration of the subject, on his application, within three days after the service of the notice.

Sometime after this the board passed another ordinance declaring that the slaughtering of animals should not be permitted or conducted after the 15th of June, 1867, at any place in the city of New York south of 42d street; nor at any place north of that street, nor in the city of Brooklyn, without a special written permit from the board of health.

It is conceded that the ordinance forbidding the slaughtering of animals, and the order condemning the premises of the plaintiff as a nuisance, &c. are about to be put in force, and the effect will be to prevent the business of slaughtering, heretofore carried on there by the plaintiff, from being continued.

The evidence largely preponderates that the premises are well sewered, and the business of slaughtering is conducted there by the plaintiff with the greatest care and cleanliness that it is capable of, and that it is not, in this case, in fact a nuisance; and nearly all of the neighbors of the plaintiff,

McCready v. Thorne.

the other two defendants, who were also part owners, and resided in the interior, at some distance from the port of New York, where the vessel lay and Mr. Thorne resided. The other owners expressed no dissent to this employment of the vessel, and they are therefore to be deemed as concurring, and are liable for their share of the expenses, and entitled to a share of the profits. (*Gould v. Stanton*, 16 Conn. R. 12.)

Where a vessel is run by the master, on shares, it is not a chartering, nor does the master become owner for the time being. The plaintiffs were justified in considering him clothed with the usual authority of a master, especially as Mr. Thorne indorsed the action of the captain in dealing with the plaintiffs, before they gave him credit.

Under these circumstances the master can bind the vessel and her owners for supplies and necessities furnished.

Captain Cathcart testifies, in substance, that the money advanced to him, and expended, by the plaintiffs was for the account of the schooner. The plaintiffs rendered him an account, and he certified it to be correct. There is nothing calling this evidence in question, except the failure to be able to state, at the time he testified, after the lapse of several years, what the money was expended for. The fact that he certified to its correctness, when the account was fresh in his recollection, is pretty good warrant for him to testify that the money was advanced by the plaintiffs for the account of the schooner, and sustains the facts, in this respect, as found by the referee. The items are such as to indicate a probability that they were necessary expenditures, so far as the articles were paid for directly by the plaintiffs. How the captain expended the money paid to him by the plaintiffs, is not detailed; but the disbursement of it for the vessel, made by him, is not impeached, except by his inability to state it, as before remarked.

There appears to be an error in the computation of interest, amounting to \$9.40. This amount the plaintiffs must remit.

Benjamin v. Elmira, Jefferson and Canandaigua R. R. Co.

The judgment should be reversed, and a new trial had before the referee, unless the plaintiffs within twenty days remit the said sum; and in the event of their so remitting the amount, the judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 8, 1867. *Leonard, Sutherland and Ingraham, Justices.*]

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SIMEON BENJAMIN, OLIVER PHELPS and EBEN SMITH, *vs.* THE ELMIRA, JEFFERSON AND CANANDAIGUA RAILROAD COMPANY.

A mortgage given by a railroad company to secure the payment of its bonds, a bond issued by the company, and a certificate indorsed thereon, stating that such bond is included in the mortgage, are all to be construed together, as parts and parcels of the same security.

A mortgage, executed by a railroad company upon its railroad, with the lands, tracks, buildings, privileges and franchises, "together with all the locomotives, tenders, cars, carriages, tools and machinery owned or *thereafter to be owned* by the company, or in any way belonging to or appertaining to said road and to be used thereon," is valid in equity, in respect to subsequently acquired property; and a decree in a suit brought to foreclose the same, declaring such to be its effect, and directing a sale of all the property embraced therein, is a conclusive adjudication upon that point, against all persons, parties or privies in that suit.

Persons made parties to a foreclosure suit as subsequent incumbrancers by judgment or mortgage, whose rights were already acquired, and existed at the commencement of the suit, are bound to set up their claims and assert their rights, in that action, at the peril of being cut off and foreclosed, in respect to such claims.

But if the decree in such action were not binding upon persons made parties as subsequent incumbrancers, the decision of the court upon questions raised and litigated by other parties, as to the validity and effect of the subsequent incumbrances, is *res adjudicata*, and the question cannot be again litigated, while such decision remains unreversed.

If individuals are made parties defendants to a foreclosure suit as subsequent incumbrancers, that is sufficient, as respects the conclusiveness of the decree therein, whatever may be the nature of their liens. It is of no consequence that the plaintiff has made them parties as judgment creditors, when they hold a chattel mortgage upon the property.

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APPEAL from a judgment entered upon the report of a referee. The action was brought to recover the value of certain personal property, consisting of railroad locomotive engines, cars, machinery and fixtures, claimed to belong to the plaintiffs, and alleged to have been converted by the defendants, and of the value of \$32,000.

The defendants, by their answer, *First*, admitted that they were an incorporation, (under the general railway act, incorporated February, 1859,) but denied each and every other allegation in the complaint contained.

Second. They alleged that they derive title to the property in the complaint set forth, under and by virtue of a purchase thereof made by them, for the full value of said property, in good faith, and without notice of the plaintiff's title or claim herein, from Charles Congdon and Robert B. Potter, in February, 1859, and that such purchase was made and the consideration therefor paid, with the knowledge and assent of the plaintiffs, and without any notice, suggestion, assertion or claim by them that the said Potter and Congdon had not perfect title to said property, or that the plaintiffs had any claim thereto, or interest therein, whatever.

Third. That in the year 1857, Shepherd Knapp and William H. Townsend, trustees, and Septimus Crooks, brought their certain action in this court, against the Canandaigua and Elmira (formerly called Canandaigua and Corning) Railroad Company, and others, to foreclose a certain mortgage, dated July 2d, 1850, made by that company to the said Knapp and Townsend, trustees, and claiming, among other property, that claimed by the plaintiffs herein, in which action the plaintiffs herein were duly served with process and made parties defendant. That in said action such proceedings were thereupon duly had, that on the 18th day of May, 1858, the said court, among other things, duly ordered, adjudged and decreed that the defendants in that action, and each and every of them, and all persons claiming, or to claim, from, by, through or under them, or either or any of them,

Benjamin v. Elmira, Jefferson and Canandaigua R. R. Co.

and all persons having a lien subsequent to said mortgage, dated the 2d day of July, 1850, whether by the subsequent mortgages set forth in the complaint in that action, or by judgment, decree or otherwise, upon the mortgaged premises and property claimed in that action, and all persons claiming, or who might claim, from or under the defendants in that action, or any or either of them, be, and they were thereby forever barred and foreclosed of and from all equity, and all manner of right of redemption and claim of, in or to said mortgaged premises and property, and every part and parcel thereof, which said mortgaged property embraced the property claimed in this action.

That under and by virtue of such judgment, the property in the complaint mentioned was duly sold, and that the same was duly purchased on the 23d day of July, 1858, by parties from whom these defendants took title, and that such purchase was made, and the consideration therefor paid, with the knowledge and assent of the plaintiffs, and without any notice, suggestion or claim made or asserted on their part, of any title to, or right in the said property in the complaint mentioned.

Fourth. That on or about the 24th day of January, 1861, the defendants purchased, for a valuable consideration, the said property claimed in the complaint herein, of the Elmira, Canandaigua and Niagara Falls Railroad Company and paid therefor. And that such purchase was made by the defendants in good faith, with the knowledge and assent of said plaintiffs, for a valuable consideration, and without any notice, suggestion or claim made or asserted on their part of any title to or right in the property in the complaint therein mentioned. And that the plaintiffs, or some of them, were interested in the consideration paid on such last mentioned sale for the property now claimed by them herein.

Wherefore the defendants claimed and insisted that the plaintiffs of any claim or title they had to the said property in the complaint mentioned or any thereof, were wholly barred,

In the Matter of the Extension of Church Street.

B. W. Bonney, Wm. Tracy, H. H. Anderson, S. P. Nash, H. Hilton, S. G. Courtney, E. Gerry, J. C. Dimmick, E. S. Van Winkle, — Van Ingen, and G. DeForest Lord,
for the objectors.

By the Court, LEONARD, P. J. Application for the confirmation of the report of the commissioners.

The extension covers a distance of 1900 feet in length and 80 feet in breadth, including property valued at over two and one half millions of dollars. No complaint has been made that the property taken has been estimated above its actual value, or that too large a sum is to be paid therefor to the owners. Nor is it disputed that the improvement is one of great value and necessity for the large and greatly increasing travel and traffic of the city. Indeed, the question of the necessity, or propriety, of the improvement, is not before the court, the consideration of that subject having been conferred by law upon the discretion of the common council, who pass upon it before the application to the court for the appointment of commissioners.

The value of the property taken, considering its dimensions, is enormously large, and its assessment upon the lands immediately adjacent, would be wholly beyond the actual improvement or enhanced value thereof. It is complained that the area of assessments for benefit, extending to the southerly side of Fourteenth street, nearly two miles from the improvement, is too great, and wholly outside of the range within which there is any improvement or enhanced value of the lands.

A wide discretion has been conferred by law upon the commissioners in this respect. They are authorized to extend their assessments to any lands they deem benefited. (§ 1, *ch. 81, Laws 1816.*)

The statute takes this subject out of any review by the courts. The commissioners appear to be vested with sole discretion in this respect. The question is practically one of

In the Matter of the Extension of Church Street.

fact, and not of law, and I do not perceive that the legislature could have expected that the courts would be better able to decide upon the propriety of the extent of territory to be included in the assessments for benefit than the commissioners. Judge INGRAHAM appears to have reached the same conclusion in *the matter of the Central Park*.

It is a settled principle of law, that where a discretion has been conferred by statute, its exercise cannot be reviewed, and is not subject to any appellate tribunal.

Several of the city parks and markets have been assessed for benefit to an amount exceeding half a million of dollars, the payment of which falls directly upon the city treasury, and on the public, as tax-payers. It is objected on behalf of the comptroller that these portions of the city property are not benefited by the proposed extension.

The practice has prevailed, when any of the city property has been taken for a street, that its value should be assessed, and payment made therefor to the city in the same manner as to other property owners. While it is to be expected that the parks belonging to the city will be maintained for the benefit of the public, it is not certain that such will be the case. The lower portion of the city hall park has been recently sold to the general government, and it is expected that an edifice will be constructed thereon, to be used as a government post office. I will not undertake to say that the price of the park has been enhanced by the extension of Church street; but its future value for building or commercial purposes, should such change be made, would be improved as much as the land on the opposite side of Broadway, or other contiguous premises.

I am informed that the city was paid a large sum for the lots belonging to it taken for the Central Park, and was also assessed for the extension of Madison avenue; both of which which reports were confirmed.

The parks and markets have the same value as property as other lands, and it seems just that they should bear a pro

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rate assessment for public improvements. The neglect to assess them would correspondingly increase the assessments against private owners.

Objections were made by Mr. Fellows and others for insufficient awards for damage; but an examination shows that there is but a trifling difference between the valuation placed by these objectors upon their property, and the awards made by the commissioners. I infer that the commissioners reconsidered their awards before presenting their report, as these objectors mention a lower valuation as having been made. There appears to be no sufficient ground for disturbing the report on the complaint of these parties for insufficient awards of damage. It is also objected that one of the commissioners has never conferred or consulted with the others, and has not signed the report. If the facts sustained this objection, to the extent above stated, it would be fatal to the validity of the report. It conclusively appears, however, that the commissioner referred to, appeared and took the oath of office; that he, with the other commissioners, agreed upon future meetings at a fixed day of the week, and he did meet with the others on several occasions, and transacted some business. He was notified in writing of several meetings. He was notified orally and made partial promise to attend particular meetings. He did not resign, or notify the other commissioners that he would not act in the matter. The board of commissioners was regularly organized, and it does not appear that the two who have signed the report were informed that the other member of the board objected to act or confer with them, (unless it was to be inferred from his neglect to be present at their meetings,) until his final refusal to sign the report. Unless his actual presence is necessary, the notices given and fixed periods for regular meetings of the board, after the organization, charged him with notice of all the meetings, and made the action of the commissioners as a board, regular, and the action of the majority will be the act of the whole. (*People v. Batchelor*,

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22 *N. Y. Rep.* 130.) In the same case it is held that when a power is to be exercised by several persons, a majority of the whole number may proceed to act, and their action will be legal, provided all the members composing the body are summoned to attend, or had notice of the time and place of meeting. If the rule were otherwise, the minority could paralyze and prevent all action of the majority. The rule prevents one member of a board, consisting of three persons, from holding his place, but by neglecting or refusing to meet or take action with the others, nullifying or suspending the power of the majority to proceed with the business committed to them. I think it must be held that this objection is not well taken.

It was assented to by the corporation counsel, very properly I think, that the report must be recommitted to commissioners to take further proof and reconsider their report in reference to the award of damages made to C. E. Detmold as owner, and to Drake & Barnes, as lessees of the premises known as No. 105 Liberty street, and to readjust the same. Also for the purpose of correcting the assessment of property belonging to the United States. Also for the purpose of modifying the assessment for costs according to the final taxation of them.

There appears to be an irregularity in the award for damages in favor of the New Jersey Central R. R. Co. The evidence shows the award to be wholly inadequate. The report must be recommitted in this respect for further evidence and a readjustment of the award.

There is also an objection that the limits of the assessment are not distinctly or sufficiently stated. I am not able to discover the defect. The contestants appear to have found out that they were affected, and have been heard as to their objections.

The charges of legal irregularity have not, in my opinion, been sustained, and the report, except in the respects above mentioned, should be confirmed.

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No charge of fraud has been brought against the report. The only objections urged are those to which I have adverted, and relate to the legal regularity of the proceedings.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clerks and Miller, Justices.*]

WHEELER vs. ALLEN.

Where scrip, purchased by a person as agent for another, is taken in his own name, and has stood in that way, on the books of the corporation, for several years, it is a legal inference that it was by consent or permission of the principal. A demand and refusal, in such a case, to *transfer*, will not give the principal the title to the scrip; and possession, without a transfer, would be of no avail to him.

A party cannot recover scrip of which the legal title is in the defendant by his permission, in an action of *replevin*, or the corresponding action of *claim and delivery*. If such party desires the identical scrip, his remedy is in equity. If he desires damages, only, he can, *it seems*, maintain an action on the case.

A verdict and judgment, in form, as if the action were on the case, are wholly unwarranted in an action for the claim and delivery of personal property.

APPEAL from a judgment entered on the verdict of a jury, and from an order denying the defendant's motion for a new trial. The complaint alleged that the defendant had become possessed of, and wrongfully detained from the plaintiff, the following goods and chattels of the plaintiff, that is to say: Securities (partially written and partially printed) known as "scrip of the Great Western Insurance Company," in and of the city of New York; one portion of said securities being of the value and amount of the sum of thirteen hundred and ten dollars of said scrip, issued by the said company in the year eighteen hundred and sixty-four, and the remaining portion thereof being of the value and amount of the sum of thirty-five hundred and seventy dollars of said scrip, issued by said company in the year eighteen

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hundred and sixty-five, of the value of four thousand eight hundred and eighty dollars. Wherefore the plaintiff demanded that the defendant might be adjudged to deliver to the plaintiff the said goods and chattels, and to pay the plaintiff damages for the detention thereof, to the sum of one thousand dollars, and that the same might be forthwith delivered to the plaintiff.

The answer was a general denial.

On the trial it was proved that the defendant purchased the scrip in question as the plaintiff's agent, in his own name, and the scrip stood in his name, on the books of the company, for several years, the dividends paid from time to time being received by the defendant and credited to the plaintiff. A demand and refusal to transfer the stock to the plaintiff, before suit brought, were proved.

The jury found a verdict generally for the plaintiff, assessing the value of the scrip at \$4067.10, and the damages at six cents, and judgment was rendered for that sum, with costs, (\$231.09,) amounting, in the whole, to \$4298.25.

The defendant appealed.

Wm. Henry Arnoux, for the appellant.

Wm. A. Coursen, for the respondent.

By the Court, LEONARD, P. J. This action cannot be maintained. The scrip was held by the defendant, on the books of the Great Western Insurance Company, in his own name. The legal title was in him. As the scrip stood in that way for several years, it is a legal inference that it was by the consent or permission of the plaintiff. A demand and refusal to *transfer*, did not give the plaintiff the title to the scrip. Possession of the scrip, without a transfer, would be of no avail to the plaintiff. All that the plaintiff could recover (assuming that he could maintain replevin) would be the possession of that which would not avail him,

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viz : scrip standing in the name of Allen. Such a recovery would be nugatory. But the plaintiff cannot, in my opinion, recover scrip of which the legal title is in the defendant by his permission, in an action of replevin ; or of claim and delivery, which is an action of the same legal nature.

If the plaintiff desires the identical scrip, his remedy is in equity. If he desires damages only, he can, perhaps, maintain an action on the case.

The verdict and the judgment here are in form, as if the action were on the case ; but are wholly unwarranted in an action for the claim and delivery of personal property.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clerks and Wallen, Justices.*]

 MARKHAM vs. JAUDON *et al.*

Where a person employs brokers to purchase stocks for him, upon an agreement that he shall keep a margin of ten per cent upon the par value above market rate, of the shares, in the hands of the brokers, and he fails to do so, whereupon the brokers notify him of a fall in the market price of the shares, and that they require him to furnish more money, to make his margin good, they may, upon his neglecting to comply, sell the stock, at the stock exchange, without further notice to the owner. (WELLES, J. dissented.)

There is, under these circumstances, a clear breach of the principal's contract, which justifies the brokers in selling ; and the notice of the time and place of sale, required in the case of a sale of pledged stock, need not be given.

The defendants having testified to an express agreement that the stock purchased by them might be sold, if the margin was not kept good, without any notice of the time or place of sale ; *Held* that it was error for the judge to charge the jury that such an agreement was wholly improbable.

THIS is an action against the defendants for wrongfully and unlawfully selling 100 shares of Erie Railroad stock, and 200 shares of Cleveland and Pittsburgh Railroad stock.

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The plaintiff had deposited upwards of \$1900 as security with the defendants, and they advanced this money and bought these stocks for him. This purchase was made April 26th, 1865. On the 27th of May the market price of the stocks had fallen. The defendants wrote to the plaintiff and notified him to furnish more security or margin. There was no attempt to prove any notice of a time or place of sale if the security or margin was not furnished. On the 30th of May, without any further notice, the stocks were sold. The result was a large loss, which absorbed the margin and brought the plaintiff in debt. The complaint is for the conversion of the stocks. The answer alleges that the agreement between the parties was that the plaintiff should keep a margin of ten per cent above the market price of the stock, and if he failed to do this, the defendants could sell, according to the custom of brokers. At the trial, before a justice of this court and a jury, the defendants swore that there was an express agreement made by the plaintiff that they might sell his stock and confiscate his security or margin, if the price of the stock fell so that there was not ten per cent, without notice or demand of additional security, and without notice of time and place of sale. The plaintiff denied any such contract, and any waiver of his rights by law in the relation in which he stood to the defendants.

The defendants offered to ask the plaintiff if he knew of the existence of a custom between brokers and their customers by which the broker has the right to sell out the customer's stock on the exhaustion of the margin? This evidence was excluded.

The jury found a verdict for the plaintiff for \$4850, and judgment having been entered thereon, the defendants appealed therefrom, and from an order denying the defendants' motion for a new trial.

Henry B. Barnett, for the appellant.

James Emott, for the respondent.

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LEONARD, P. J. The judge held at the circuit, substantially, that the relation of debtor and creditor existed between the broker and his customer, and also that of pledgor and pledgee, when a stock broker purchases shares for his customer, upon a margin furnished by him, and agrees to hold or carry the shares so purchased, in case a margin of ten per cent is kept good. The judge also held that the broker could not sell the shares so purchased without notice of the time and place of sale, upon a failure of the customer, or purchaser, to comply with his contract in keeping his margin good.

The evidence as to some portions of the contract between the plaintiff and the defendants was contradictory, but there was no dispute that the plaintiff was to keep a margin of ten per cent upon the par value above the market rate of the shares in the hands of the defendants ; that he failed to do so ; that the defendants duly notified him of the fall in the market price of the shares, and that they required him to furnish more money to make his margin good, and that the plaintiff having neglected to do so, the defendants sold out the shares at the stock exchange without further notice to the plaintiff.

There was a clear breach of his contract on the part of the plaintiff ; and unless the obligation imposed by law upon a pledgee to notify the pledgor of the time and place of the sale of the thing pledged, devolves upon the defendants, under such circumstances, upon such a contract, they had the right to sell the shares in the manner they did, and the plaintiff has no cause of action.

The effect of the contract is that the broker, upon the performance of certain conditions by the customer, will buy and hold a certain number of shares, and in case any advance accrues and is secured by a sale made under the direction or authority of the customer, he shall enjoy the benefit of it, and in case a loss ensues, the broker having performed the contract on his part, the customer shall bear it. It does not

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appear that, in the present case, the shares were to be carried for any certain or named period of time. The plaintiff, no doubt, could have terminated the transaction at any time, even in case no agreement as to time existed, by directing a sale of the shares, or by paying the cost, with interest and commissions. The defendants could not do so when there was no stipulation as to time, except, perhaps, on sufficient notice to the customer, while his margin was good, or upon failure to keep the agreed margin fully supplied.

The broker lends no money to his customer, and gets no security from him, except as against the contingent liability which may arise from a fall in the market price of the shares. The shares purchased are the primary source for the payment of the money advanced by the broker, in case the customer does not desire to pay for them and take them into his own possession, or neglects to perform the agreement with his broker. The "margin" is the security against loss on the part of the agent. The margin, instead of being paid in money, may be secured by a pledge of property, and such security would then be subject to the rules of law governing pledges.

Suppose the broker purchased 100 shares on the order of his customer for cash, but upon being called upon after the purchase of the shares the customer should neglect or be unable to pay for them. There could be no pretense of the existence of a pledge, or that the broker must give notice of the time or place of the sale of the shares so purchased. The broker might realize his money by an immediate sale for the account of the principal on the most summary notice of his intention to do so, or even without any notice. This course is justified by the breach of the implied promise of the purchaser to pay cash as soon as the purchase should be made. The principal would be liable for the loss, if any arose; or, if any profit accrued, he would be entitled to receive it; the broker having trusted him in making the transaction, without

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the cash in hand. It can make no difference in the relation or liability of the parties, if the broker should hold the shares, and forbear for a time to close out the transaction by a sale. The broker does not become a pledgee and his customer a pledgor of the shares, in consequence of the postponement. Nor am I able to perceive that the relation or liability of the parties would be varied in this respect, if the postponement should take place under an agreement between the broker and his customer for that purpose, as in the present case. In either case, the right to sell arises from a breach of the customer's contract; in the one case for failing to supply the margin agreed on, and in the other from the non-payment of the price. The nature of the transaction also requires, in many instances, the right to make a prompt sale to prevent loss.

Under a contract like the one proven, the customer does not become the owner of the shares upon their purchase by the broker. He may become the owner if he pays for them; but under the contract his interest exists only in the margin, which, by the enhanced market value of the shares, may be largely increased, or by a decline may be wholly extinguished and a further loss ensue. The transaction bears more resemblance to a conditional sale of property, which will belong to the purchaser on the fulfillment of his contract, but upon his breach, he will lose not only his right to obtain the property, but also such sum as he has paid—depending, in this particular, upon the terms of the contract.

I concur entirely with the observations of Judge INGRAHAM, in the case of *Hanks v. Drake*, (*ante*, p. 186,) wherein, upon a similar state of facts, he remarks: "Under such an agreement the defendants had a right, upon the plaintiffs failing to deposit a further margin when required so to do, to sell the stock and close the transaction. This right to sell arises from the previous violation of the contract on the part of the person for whom the stock was purchased, and who, by neglecting to perform on his part, terminated the obligation of

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the defendants to hold the stock any longer, and left them at liberty to sell the stock for their own protection. The notice which the law requires in the case of a sale of a pledge of stock as security for the payment of a sum of money advanced thereon is not required in such a case." This must be the law of our general term, until overruled by higher authority.

I do not say that the notice in this case was sufficient, or otherwise. That question was wholly disregarded by the judge at the trial. He was asked to charge "that the plaintiff was at the risk to inform himself of the state of the market." The judge said, "he was bound to inform himself of the state of the market; no doubt about that; and it was his duty to keep this margin good; but the moment he failed as pledgor, he had a right to notice before he could be sold out, unless there was an express agreement."

He was afterwards asked to call the attention of the jury to the fact of the plaintiff having an office. The judge replied "there is no pretense of any notice of the time and place of the sale of the stock." Counsel then inquired: "Does your honor hold that to be necessary?" and the judge replied, "I have so held." Thus the verdict was called for by the charge, as if it turned wholly upon the notice required in the case of a pledge.

The jury were misled by this position, and no fact in dispute was before them for consideration, although a lengthy charge had been delivered. They might as well have been instructed to find for the plaintiff; for there was no evidence of any notice of the time or place of the sale, and the case was made to turn upon the omission.

There is also another branch of this case deserving of attention.

The appeal is from an order refusing a new trial upon the merits, as well as upon the law arising upon exceptions. The defendants testified to an express agreement that the stock purchased by them might be sold if the margin was not kept good, without any notice of the time or place of sale, or any

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notice of any kind. The judge argued to the jury in strong terms that such an agreement was wholly improbable, while to those who are acquainted with the transactions customary among stock brokers in the city of New York, it is pretty well understood that any argument drawn from the improbability of the existence of such an agreement would be wholly unfounded.

The defendants sustained, in my opinion, an injury before the jury by the unauthorized expression of the personal views of the judge.

On both grounds there should be a new trial, with costs to abide the event.

CLERKE, J. concurred.

WELLES, J. (dissenting.) The relation which these parties sustained to each other was two-fold. First, that of principal and agent in respect to purchasing the stocks in question, by the defendants for the plaintiff; and, second, that of pledgor and pledgee in reference to the right and power of the defendants to keep and hold the stocks after they were so purchased, as security for their advances in making the purchases, and of disposing of them in any event. In regard to the first, there appears to be little or no dispute. Brokerage is a species of agency, and is so treated in all the elementary books on the subject.

In the purchase of stocks by a broker, for his principal, where the former advances the whole or any part of the purchase price, he may hold the stocks as security for the repayment of such advances.

In consequence of the fluctuations in the market value of nearly every kind of stock, it is usual for the parties to agree, where the broker is to carry the stock for any time, that the principal, or person on whose account the purchase is to be made, shall place in the hands of his broker or agent, a sum of money or its equivalent, which, in the dialect of stock brokers,

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is called a *margin*, as a further security to the latter against losses to which he may be exposed by reason of subsequent depression in the market value of the stocks to be purchased.

The stocks in question were one hundred shares of the Erie Railway Company, and two hundred shares of the Cleveland and Pittsburgh Railroad Company. These stocks were purchased on or about the 26th day of April, 1865, by the defendants, at the request and for the account of the plaintiff, at an aggregate cost of about \$16,200, the defendants having in their hands at the same time a margin of between 19 and 20 hundred dollars. Evidence was given by the plaintiff tending to show that the defendants agreed to hold these stocks until the plaintiff should direct them to be sold. The defendants gave evidence tending to prove that it was agreed by the plaintiff to keep the margin of 10 per cent good, and that in case it was not kept good, the defendants were to be at liberty to sell the stocks without notifying the plaintiff, and without giving notice of the time or place of sale; and the plaintiff gave evidence contradicting such alleged agreement of the plaintiff. The justice before whom the action was tried, held, and so charged the jury, that if they believed that the plaintiff so agreed as alleged by the defendants, the plaintiff could not recover, and submitted the question fairly to the jury.

It appeared that on the 30th of May, 1865, the defendants sold the 100 shares of Erie stock, and on the 7th July of the same year they sold the 200 shares of Cleveland and Pittsburgh stock, for the aggregate amount of \$14,062.50; that at the times of such sales the market value of these stocks had become so depressed that the whole of the margin in the plaintiff's hands had become exhausted.

It also appeared that in the latter part of July the plaintiff directed the defendants to sell the 100 shares of Erie stock, and as the plaintiff testified, the defendants then for the first time, told him the whole of the stocks (Cleveland and Pittsburgh, and Erie) had been sold, and that that was

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the first time the plaintiff had notice or knowledge of the sales, or of any intention on the part of the defendants to sell. There was no attempt to show that any notice of the time and place of the sale was ever given to any person, in any way. The sales were made at auction, at the board of stock brokers. Afterwards there was a large advance in the market value of both of these kinds of stocks.

The doctrine of the judge's charge to the jury was that the transaction was a pledge of the stocks to secure the repayment of the money advanced by the defendants, &c. ; that the duty of the defendants was to give notice to the plaintiff that his margin was diminished or exhausted, and require him to make it good ; and that before he could legally sell on the plaintiff's default, &c. he must give reasonable notice of the time and place of sale.

In the case of *Hanks v. Drake and others*, recently decided by the general term of this district, (*ante*, p. 186,) Judge INGRAHAM holds that, in a case like the present, the transaction is not a pledge of stocks, but an agency by the broker to purchase for another and hold the stock as security that the margin shall be kept good and the advance be repaid ; and that in case the owner of the stock was in default, the broker might sell without previous notice of the time and place of sale. The case, however, did not necessarily, nor indeed at all, depend upon that question, but seems have been decided on the ground that there had been a clear ratification of the sale of the stock, which was claimed to be illegal for want of notice. The learned justice refers to the cases of *Genet v. Howland*, (45 Barb. 560,) and *Milliken v. Dehon*, (27 N. Y. Rep. 364,) in both of which cases the parties agreed that in case of failure, &c. a sale might be made without notice.

In the present case it cannot be doubted that the stocks in question were in the hands of the defendants as security for money advanced ; nor that the legal title was at the same time in the plaintiff. Must not their relations have been

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either that of pledgor and pledgee, or of mortgagor and mortgagee? It could not be the latter, for the reason that the title was in the plaintiff, and so continued from the time they were purchased by the defendants. A mortgage of personal property conveys the title, subject to be defeated by payment, or other performance of the condition. A sale is never necessary to perfect the legal title under a mortgage after condition broken. It is only of service to foreclose a supposed equity of redemption. It is a dead pledge, as its name imports. In case of a simple pledge there is no title in the pledgee, but the same continues in the pledgor until after a sale for condition broken; and such sale must be on reasonable notice of time and place, unless otherwise provided in the contract of bailment. I confess I am unable to see in the transaction, so far as it relates to the terms and conditions upon which the defendants held the stocks, any thing but a mere simple pledge. (*Wheeler v. Newbould*, 16 *N. Y. Rep.* 392. *Dykens v. Allen*, 7 *Hill*, 497. *Brass v. Worth*, 40 *Barb.* 648.)

The evidence on the part of the defendants, tending to show what was the contract, was flatly contradicted by that given by the plaintiff, and the question was submitted to the jury, with proper instructions, and the verdict settles the question in favor of the plaintiff—that the contract was as he claims it to have been.

The offer of evidence, by the defendants, of the existence of a usage, was properly excluded. The law settled the rights of the parties, which could not be varied essentially by a usage by which the plaintiff never agreed to be bound.

In my opinion the judgment and order appealed from should be affirmed, with costs.

New trial granted.

[NEW YORK GENERAL TERM, June 3, 1867. *Leonard, Clarke and Wallis*, Justices.]

S. F. JOHNSON and another *vs.* JANE PLOWMAN.

Where an answer alleged that it was agreed between her and the plaintiffs upon her purchasing goods of them, "that she was to make payments, from time to time, as she could, out of her business, and from the proceeds of the sales" of the goods; *Held*, that it was erroneous for the judge, at the trial, to construe the answer as meaning that the defendant was to make payments, from time to time, as she *conveniently* could.

Held, also, that it was erroneous for the judge to charge the jury that if they believed that the defendant purchased the goods with the understanding that she should pay for them when convenient, and that it had not been convenient for her to pay, before the action, they should find for the defendant.

Upon such an answer, the burden of proof is with the defendant.

A PPEAL from an order made at a special term, denying a new trial, and from a judgment entered upon the verdict of a jury, upon exceptions taken at the trial.

The complaint alleged that between the 17th of July, 1865, and the 24th of August, 1865, the plaintiffs sold and delivered to the defendant, at her request, merchandise, for which she promised to pay the sum of two hundred and thirty-five dollars and eighty-one cents, and that there remains due, and unpaid, the sum of \$186.31, with interest. For which sum, with costs, judgment was demanded.

The defendant, in her answer, admitted that she purchased goods of the plaintiffs, as alleged in the complaint, leaving the balance claimed, but alleged that she bought said goods payable on no set or specified day or time, but, on the contrary, she refused to make any purchase until it was distinctly agreed that she was to make payments, from time to time, as she could, out of her business, and from the proceeds of the sales of said goods. And she averred that she had kept her bargain and agreement so made by her, and was still willing and anxious to do so, but that the plaintiffs, in violation of their said agreement with her, insisted upon changing the same, and compelling her to pay them said balance at once, or making her enter into a new agreement with them,

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in regard to the same. Wherefore she denied her indebtedness, and asked for a dismissal of the complaint.

On the trial, the judge stated that he should construe the language of the answer to mean that the defendant was to make payments, from time to time, as she *conveniently* could. To this ruling, the plaintiff's counsel excepted.

The jury found a verdict for the defendant.

Wm. Henry Arnoux, for the appellants.

C. J. Jack, for the respondent.

By the Court, WELLES, J. I think the justice erred in the construction which he gave to the language of the answer, "that it meant that she was to make payments, from time to time, as she *conveniently* could." The answer states that it was "distinctly agreed that she was to make payments, from time to time, *as she could, out of her business, and from the proceeds of the sales of said goods.*"

I can see nothing in the answer to warrant the construction given to it. The language is perfectly plain, that she was to pay as soon as she could. There is no room for construction. The word "*conveniently*" changes the plain and obvious meaning of the answer. If the defendant is to be judged by her words, under the sanction of an oath, she was bound to pay for the goods as soon as she could out of her business and from the proceeds of the sales of the goods in question. She testified that she received from these sources in July \$150, in August \$75, in September \$50, and in October \$50—in all \$325. The whole amount of her purchases from the plaintiffs was \$285.31. If it was to be left to her convenience, the time might never arrive when she would be under obligation to make payment.

The same error affected the judge's charge to the jury, in which he told them that if they believed that the defendant purchased the goods with the understanding that she should

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pay for them when convenient, and that it had not been convenient for her to pay, before the commencement of the action, they should find for the defendant.

There was a conflict in the evidence upon the question of what the contract really was, and at the close of the evidence the plaintiff's counsel requested the court to charge the jury that the burden of proof was with the defendant, which the court declined. This, it seems to me, was also an error. It was conceded, in the opening, at the circuit, that the defendant held the affirmative, and the defendant accordingly put in her evidence to sustain the defense set up in the answer. The proposition was strictly true, and I think the plaintiff had a right to have the jury so instructed.

For the foregoing reasons, I am of the opinion that the judgment should be reversed, and a new trial granted, with costs to abide the event.

LEONARD, J. I concur with Judge WELLES. As matter of law, the plaintiffs were entitled to judgment, and the jury should have been so directed, in my opinion.

CLERKE, J. I dissent. The meaning of the parties in the purchase was derived from the evidence.

New trial granted.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clerk and Welles, Justices.*]

ALEXANDRE and others vs. THE SUN MUTUAL INSURANCE COMPANY.

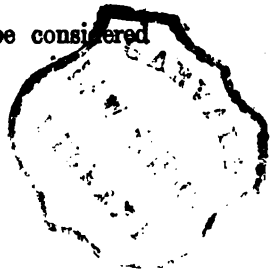
Where the temporary repairs are made upon a vessel in a foreign port, by the insured, for the sole benefit of the insurers, and by their express consent and authority, to enable the vessel to be navigated to the port of destination, for the purpose of there making permanent repairs at less cost, the insurers must bear the whole expense of the temporary as well as the permanent repairs, although the amount, in the aggregate, exceeds the sum named in the policy.

THE defendants insured the plaintiffs, in the sum of \$8000, upon eight-tenths of their brig, E. F. Newton, afterwards called the Antonio Mathe, against marine risks, in the usual form; the brig being valued at \$10,000. The following statement of facts was agreed on as correct by the counsel for both parties, viz: The brig left Belize, Honduras, for New York, with a cargo of logwood, &c.; ran on a reef; was got off too much damaged to pursue her voyage without repairs; went back to Belize, unloaded, was surveyed, was found to be so much injured that it was impossible permanently to repair her at Belize; forwarded her cargo by another vessel. After the survey, the master wrote to the plaintiffs, from Belize, stating the condition of affairs, and asking for instructions. His letter was communicated to the defendants, who requested the plaintiffs to instruct him. They did so, in the following letter:

"Nov. 4th. Capt. GEO. MARSHALL, Brig Anto. Mathe: Dear Sir, We have received your favor of the 7th ulto., and observe what you say, and we very much regret to learn that the damage to the brig Ant. Mathe is much more than you had at first supposed.

We have consulted with the underwriters and they leave the matter in our own hands. We, therefore, request you to consult with our friend Anto. Mathe in all matters concerning the brig.

We wish to put only such repairs as will be considered perfectly safe to bring the brig to this port.



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Per brig "Lucy Heywood," to sail in about ten days, we shall send you a foreyard and, as to the foressail, it appears to us that you will have had sufficient time to put it in good repair on board. We shall also try to send you such pump gear as you suggest.

In a word, whatever you and Mr. Mathe decide about the brig is approved beforehand, and, in hope to see you with her soon, we remain, dear sir, yours very truly,

F. ALEXANDRE & SON."

This letter, before being forwarded, was exhibited to the defendants, and they wrote at the foot thereof as follows :

"Office Sun Mutual Ins. Co., November 4th, 1864. We, as underwriters on the hull of brig Anto. Mathe, concur in the above.
E. B. ANTHONY, Vice President."

This letter and concurrence having been received by the master, the necessary temporary repairs were made at Belize, and the vessel came to New York. The cost of the temporary repairs at Belize was, together with the cost of exchange, the sum of \$8769.74. In taking the brig back from the reef to Belize, unloading her there, taking care of her and her cargo there, and ascertaining the nature and extent of the damage sustained on the reef, and before it was concluded to send forward part of the cargo by another vessel, certain expenses were incurred, specified in the general average statement, the proportion of which applicable to the said brig was \$581.18. When the vessel arrived in New York, she was repaired in full ; at an expense, after deducting one third, new for old of \$4547.21.

The defendants have paid the sums mentioned in the answer, on account of the loss and interest, and have also paid the costs of this action accrued at the time of such other payment.

Preliminary proofs of loss and interest were served by the plaintiffs on the defendants, on the 20th of May, 1865.

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The plaintiffs claimed as follows :

Vessel's portion, general average,	\$581.18
Temporary repairs,	8769.74
Full repairs,	4547.21
	<hr/>
	\$13,898.13
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Eighth tenths of which is	11,118.51
Received from defendants (besides costs,)	8000.00
	<hr/>
	\$3118.51
Interest from June 20, 1865,	163.72
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	\$3282.23

The defendants claimed that the \$8000 paid would satisfy their liability under the policy.

It was impossible at the scene of disaster to ascertain the extent of the damage to the vessel. Belize was the nearest port to which she could be taken for the purpose of ascertaining the extent of such damage. The temporary repairs put on at Belize, were put on for the purpose only of enabling her to come to the port of New York.

The action was tried before one of the justices of this court, and a jury.

The plaintiffs having rested their case, the defendants offered no evidence, and moved for a dismissal of the complaint on the ground that it appeared by the evidence that the plaintiffs' liability under the policy had been satisfied. The court denied the motion, and the defendants' counsel excepted to the decision.

The court directed a verdict for the plaintiffs for the total amount claimed by them, viz. the sum of \$3282.23. To this direction, ruling and decision the counsel for the defendants excepted. The jury thereupon found a verdict for the plaintiffs for the amount so directed. The court then ordered the exceptions taken at the trial to be heard in the first instance

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at the general term, and judgment on the verdict to be in the mean time suspended.

H. P. Fessenden, for the defendants. I. The instructions to the master did not justify him in expending a sum so excessive, in temporary repairs. The vessel was valued at \$10,000, and was already subject to a lien of \$581.18, for general average. For the mere purpose of getting her to a place where she might be fully repaired (at a cost of \$4547.21,) he expended the utterly unreasonable amount of \$8767.74. It is true that by the terms of the letter he was authorized to do, in making the vessel perfectly safe to come to New York, whatever he and Mr. Mathe should decide. But an authority unlimited in terms is still limited, necessarily, by the nature of the subject and the circumstances of the case. An unlimited authority to buy a coat for a private citizen would not justify the agent, under ordinary circumstances, in giving a thousand pounds for one. Still less would an order to buy a stock which was at par, warrant the agent in paying a premium for it. The discretion, though it be unrestricted by any words, must still be exercised with some show of reason. To expend nearly \$8800 for the purpose of getting a vessel worth only \$10,000, and already charged with a lien of about \$600, to a place where it would cost upwards of \$4500 more to repair her, cannot be justified under the circumstances of the present case. (*Vide Stewart v. Steele*, 5 *Scott*, N. B. 927 ; and *opinion of Maule, J. at p. 948.*)

The master ought not, under the circumstances, to have expended more, for temporary repairs, than with the general average and a reasonable estimate of the full repairs would equal the value of the vessel. The general average and temporary repairs amount to \$9350.92 ; leaving \$650 only for the full repairs.

II. Whether, however, the authority given to the master and Mathe is to be considered subject to the limitation insisted on by the first point, or not, the defendants are not,

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merely by their approval of the plaintiffs' instructions, made liable for more than the amount of their subscription to the policy. Their assent to the instructions had no effect to enlarge the amount insured by the policy. The master was not, nor were he and Mathe jointly, made agents of the defendants by such assent. The most that can be claimed for the effect of the approval is that it waived all objections to the expenditure *within the limits of the defendants' liability*; or what, for the purposes of this cause is the same thing, within any proper limits of expenditure for temporary repairs under the circumstances. It did not of its own force transform the policy into one for the total amount of the repairs, let them be what they might.

III. The question in the cause then is not what effect is to be given to the master's acts under the special authority given him, but what are the limits of the underwriters' liability on an ordinary marine policy on vessel, under the circumstances of this case. For the purposes of this inquiry there is no difference between an insurance for a specified voyage, and one for a given period of time. 1. The meaning of the contract itself, if the question were to be considered as a new one, is obvious enough. The defendants, says the complaint, became insurers to the plaintiffs of the sum of \$8000, upon the brig Antonio Mathe, valued at \$10,000, against the perils of the seas; and further agreed to pay, in case of loss or misfortune, a proportionate share of such charges as might be incurred by the plaintiffs in the defense, safeguard and recovery of the property. The phraseology of the usual vessel policy, and of the actual policy in this case, is to the same effect; that by the defendants the plaintiffs have insured, upon a certain vessel, (which is to be estimated of the value of \$10,000,) against the perils of the seas, &c. the sum of \$8000; and that in case of misfortune, the plaintiffs shall do the best they can for the property, and the defendants will contribute to the expense of so doing in the proportion the said sum of \$8000 shall bear to the whole

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amount insured. There is here none of the obscurity often charged on policies of insurance ; which it is true rather belongs to the doctrines saddled on the policy than to the instrument itself. (*See 2 Phill. Ins. sub. 1743.*) The meaning is plain. The insurer agrees to pay. (a.) Loss or losses to the extent altogether of \$8000 : and (b.) Expenses for the protection or recovery of the property to any amount expended in good faith and with reasonable discretion. In other words, the sum insured is the limit of the defendants' liability, with the single exception of such amount as they may be bound to pay under their agreement to contribute to the charges of protecting or recovering the insured subject.

2. Now, amidst all manner of glosses, comments, constructions, *dicta*, &c. it has been adjudged and settled that the insured may recover an amount exceeding the sum insured, whenever, *besides a total loss*, he has suffered in addition what is called, (a.) A general average loss. (b.) One or more partial losses, when the same have been repaired. (c.) Salvage expenses. (d.) Expenses of contesting or appealing or ransoming from capture. But there is *no decision to be found* that for one, or for any number of these losses or expenses, *not including a total loss*, the insured are liable for more than the sum insured. The decisions are all reconciled, and placed upon an intelligible and consistent basis, by adopting the principle above stated ; that is, by referring all losses other than total losses, and unrepaired partial losses, to the head of expenses incurred for the protection or recovery of the insured property. I do not mean that all the sayings, or even all the arguings, of all the authorities will be reconciled ; but the judgments will ; and with that one must be content. *Vide*, in the order in which cited, *Lawrence v. Van Horne*, 1 *Caines*, 284 ; *Schmidt v. United Ins. Co.*, 1 *John*. 266, *per Kent*, *Oh. J.* at close of opinion ; *Watson v. Mar. Ins. Co.*, 7 *id.* 57 ; *Jumel v. Mar. Ins. Co.*, *Id.* 424 ; *Barker v. Phoenix Ins. Co.*, 8 *id.* 307, and *per Kent*, *Oh. J.* 245, § 2. This is the first case in which a general average loss is added

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to a total loss ; and it is put upon the ground of being expenses, and *Jumel v. Mar. Ins. Co.* is cited as authority ; *which it is not, unless a general average is an expense.* *Saltus v. Comm. Ins. Co.*, (10 John. 487, 490.) This was a recovery for partial loss (repaired,) general average, and total loss. The partial loss repairs were allowed as expenses. And to the point that the insured cannot recover for an *unrepaired* partial loss, besides a total loss, see *Livie v. Janson*, (12 East, 648,) and *Rice v. Homer*, (12 Mass. 234, 235 ; *Knight v. Faith*, 15 Q. B. Rep. 649.) See also, in general, 3 *Kent's Com.* 340, and note *e* ; 2 *Arnould Ins.* 1193 to 1198 ; *Stewart v. Steele*, (5 Scott, N. R. 948.)

These cases are fair representatives of the great body of cases in which a recovery has been had upon a policy of insurance to a greater amount than the sum underwritten by the defendants. Their correctness is no where questioned in any particular material to the present inquiry. Nor is there any case on record in which, except for expenses incurred under the second clause of the policy, the insured has recovered any thing over and above the sum specified in the policy. No decision, no writer of authority, so much as intimates that for any loss, or aggregate of losses occasioned by one disaster, more can be recovered *as for loss* than the sum insured. And it may also be said, by the way, and in anticipation, that there is no authority that more than a like amount can be recovered as for expenses consequent on any one disaster.

VI. The conclusion seems to follow, that if to recover the additional amounts, they must be recovered as expenses under the second clause, *they cannot be losses under the first.* It is true there are expressions in some of the cases to the effect that they may be recovered either as losses or expenses ; but these *dicta* are not necessary to the judgments, and are certainly contrary to the analogy, symmetry, coherency of the law. It is absolutely impossible to reconcile all the expressions, or even all the reasonings, of the cases with the decisions, or

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with each other. They speak of losses, when they mean expenses ; of general average losses when they mean merely expenses which other persons are bound to share, and so on. The only way to arrive at a consistent doctrine is, to confine oneself to what is necessarily implied from the judgments. And I repeat that there is no adjudged case to be found in which the insured has, under the first clause of the policy, recovered as for a loss, or losses, consequent upon one disaster, more than the sum insured.

V. Considering all the items of the plaintiffs' claim to be expenses, resulting from one disaster, they cannot be allowed to a greater amount than eight-tenths of the valuation of the ship ; that is, the \$8000 insured. For the same simple reason alluded to in the first point with reference to the authority given to the master, that expenses for the protection and recovery of any subject can never, in good faith and sound discretion, exceed the value of the subject. It can never be justifiable to spend *for another party* a thousand dollars to save five hundred.

VI. If, however, the court shall consider the items of the plaintiffs' claim not to be all of the nature of expenses, as distinguished from losses, I then observe, there is no total loss in this case. The vessel remained, a navigable vessel ; neither was the plaintiffs' title to her divested in consequence of the disaster. The aggregation of expenses, or partial losses, if you please, to an amount greater than the valuation does not make a total loss. (2 *Arnould*, 1000, § 365. *Id.* p. 999.) The verdict, therefore, cannot be supported by considering the two sets of repairs as, together, a total loss, and the general average as expenses. And, as above observed, there is no precedent for a recovery of more than the sum insured, unless one of the items be a total loss. No aggregation of partial losses, resulting from one disaster, was ever recovered for to an amount greater than the sum insured.

VII. The two sets of repairs must be taken together. The temporary repairs are but incident, and preparatory to the

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full repairs. (*Brooks v. Oriental Ins. Co.*, 7 *Pick.* 259, 268. *Am. Ins. Co. v. Center*, 4 *Wend.* 45, 51.)

VIII. If the repairs are, indeed, to be considered the loss, and not expenses, then the recovery for them ought to be limited to the sum insured. That having been paid, the verdict ought to be reduced to the amount of the general average.

XI. The verdict should be set aside, and a new trial ordered; or, at least, the plaintiffs should be required to reduce it to the amount of the general average.

James C. Carter, for the plaintiff. I. There was no dispute at the trial upon the facts; the necessity of taking the brig into Belize, discharging the cargo and examining her bottom, was conceded; that the expense attending this was the proper subject of general average, could not be denied, and was not questioned, nor was any question made as to the accuracy of the adjustment of the general average by which the brig's share of the common burden was ascertained to be \$518.18. The apparent wisdom, judging before the event, of transshipping the cargo and effecting temporary repairs at Belize, with the view of making the permanent repairs in New York, was conceded; the whole matter was laid before the underwriters, and they fully assented to the course pursued, nay, more, requested it; no question was made as to the perfect good faith throughout of the master and owners of the brig, nor was it claimed that the temporary repairs could, in fact, have been effected at a less expense; all parties were disappointed at the high figure which they reached.

II. The single point made by the defendants was, "that it appeared by the evidence that the defendants' liability under the policy had been satisfied." The case, therefore, distinctly concedes that if, under the circumstances proved, the defendants could be made liable in any sum exceeding the amount of their subscription, they were liable in the full amount claimed.

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III. The argument is thus brought within a narrow compass, and is made to turn upon the question whether, in any case, there can be a recovery against an underwriter, on a marine risk of a sum exceeding the amount of the subscription; the law on this point is well settled. The notion that the amount of the claim must be limited to the amount of the subscription is a total misapprehension, and cannot be supported by the authority of any judicial decision, or the opinion of any writer of authority; the contrary decision has followed whenever the question has been made. (*Livie v. Jansen*, 12 *East*. 648, per Lord Ellenborough, p. 655. *Le Chemmant v. Pearson*, 4 *Taunt.* 367. *Peele v. The Merchants' Ins. Co.*, 3 *Mason*, 27. *McBride v. The Marine Ins. Co.*, 7 *John.* 431. *Jumel v. The Marine Insur. Co.*, *Id.* 412. *Barker v. The Phoenix Ins. Co.*, 8 *id.* 307. *Phillips on Insurance*, vol. 2, § 1267. *Arnould on Insurance*, vol. 2, p. 847, n. 878. *Benecke & Stevens on Average*, *Phillips Ed.* 74. *Hopkins on Average*, 301, et. seq.) The rule established by the above authorities is, in some of them, based upon the clause in the policy making it the duty of the assured to sue, labor and travel in and about the defense, safeguard and recovery of the property, and imposing upon the underwriter the obligation to contribute to the expense thus incurred. In others, the nature of the contract itself is supposed to furnish the foundation of the rule, and this is probably the better opinion. (*Livie v. Jansen*, *ubi supra*. *Le Chemmant v. Pearson*, *ubi supra*. *Arnould on Insurance*, vol. 2, p. 847, n.)

IV. The equity of the doctrine declared in the authorities above cited, were it necessary to vindicate any thing so well established, will appear very plainly upon a consideration of the nature of a maritime adventure, and the connection of the underwriter with it. 1. The underwriter on a particular subject, either vessel, cargo or freight, to the extent of his subscription, stands in the place of the owner and becomes one of the concerned. If his insurance be to the full value of the subject, he becomes as to that the only one concerned.

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2. Suppose the ship become stranded by a peril of the sea, and in order to prevent a total loss of ship and cargo it becomes necessary to pay a large sum to salvors to get her off. Slight repairs may thus become necessary, making it requisite to go into an intermediate port and discharge the cargo. The expenses thus incurred are for the common benefit of all having an interest in the adventure, and the burden of them, is by the law of general average distributed among all. Very slight damage may have been done to the ship and none to the cargo, and yet the expenses thus incurred may have amounted to half the sum insured. Should a total loss occur at a subsequent period of the voyage, it would be a most inconvenient, not to say unjust, rule which should allow the underwriter to deduct from the amount of the total loss, payable by him, such a sum as he was obliged to pay by reason of the prior general average. 3. Had he been on the spot in the moment of peril, of course he would gladly have agreed to bear his proportion of the necessary expense and leave his subscription afterwards standing for the original amount; the expense was incurred as much for his benefit as for the benefit of others, and in equity it belongs to him to pay the price of his own safety; the sum which he is thus required to pay is not so much something which is due *for a loss* of a portion of the subject insured, but is an expense *extraneous* to the insurance incurred for the purpose of preventing a loss. 4. If such expenses as these were to be considered as, in effect, reducing the amount of the subscription for the residue of the voyage, how could the merchant or ship owner keep himself insured? He cannot foresee such exigencies at the commencement of the voyage, and, in general, he receives no information of them until long after their occurrence. Such a rule would furnish a most specious pretext for over insurance. 5. What is true of the example above made use of is true of *all cases* where expenses are incurred in the nature of general average; expenses of that character are always incurred *in order to prevent* a more grievous loss, and must

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be paid by the parties concerned, at all events, even if nothing is finally saved. The occurrence of a subsequent loss, whether partial or total, does not affect the obligation, nor is the liability to pay the full amount of a subsequent loss, whether partial or total, affected by the prior average loss. 6. The case is different where the general average has arisen from a *jettison* of any part of the ship or cargo ; in such case there is to be contribution only from such property as is eventually saved ; if ship and cargo are subsequently lost by a distinct peril and *nothing is saved*, there is no contribution. This is the difference between a *sacrifice of a part of the thing* and an *extraneous expense incurred*. (*Phillips on Insurance*, vol. 2, § 1355 *et seq.*) 7. Inasmuch as an average contribution for a *jettison never takes place unless something has been saved*, and is only a *part* of what is saved, it follows that such a contribution, when added to a subsequent loss, can never swell the claim to a sum exceeding the amount of the subscription. But an average contribution arising out of *extraneous expenses incurred*, inasmuch as it must be paid, whether any thing is finally saved or not, *may*, when added to a subsequent total, or even partial loss, exceed the amount of the subscription. (*Phillips on Insurance*, vol. 2, § 1268.) 8. Another case in which the underwriters may be required to pay a sum exceeding the amount of the subscription is in the case of *successive particular averages on the ship where the prior damage has been repaired before the subsequent damage is received*. In such a case, after the reparation of the prior damage, the insurable interest at the risk of the underwriter remains the same. (*Phillips on Insurance*, § 1266 *et seq.* *Hopkins on Average*, 301 *et seq.*) 9. Another instance is where there has been a total loss and an abandonment, and expenses have been incurred by the assured or the master in respect to the salvage which exceed the value of the salvage ; the underwriter is bound to pay all such expenses, if they have been incurred in good faith. This obligation may very well be based upon the clause in

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the policy permitting and requiring the assured to sue, labor and travail, in case of loss or misfortune, in and about the defense, safeguard and recovery of the property ; but it would probably still be held to exist, in the absence of such a provision, on the general principles of insurance.

V. As we have heretofore shown, this case comes before the court upon the concession that the full amount of the plaintiff's claim must be paid unless there is, in actions against underwriters, a rigorous limitation of the amount of the recovery to the amount of the subscription ; but, were it an open question, whether the particular claims made by the plaintiffs were all, *in their nature*, recoverable against the defendants, the affirmative could safely be sustained. 1. How little question there is upon this part of the case, in the opinion of the defendants, is evidenced by the fact that they have paid parts of the very claims, the whole of which they refuse to pay, and do not suggest any ground of discrimination between such parts. 2. As to the particular average of \$4547.21, it will not be pretended by the defendants that they are not bound to pay that in full ; this was the amount of the damage sustained by the brig from a plain sea peril. 3. As to the vessel's proportion of the *general average*, amounting to \$581.18, there is no denial on the part of the defendants that the expenses of which it is made up were in the nature of general average, nor any allegation of error in the adjustment ; the expenses were incurred in getting the brig into Belize, unloading her cargo and ascertaining the extent of the damage. All such expenses are everywhere conceded to belong to general average ; all these expenses must necessarily be incurred before it can be determined whether it is wise or not to endeavor to refit, and complete the voyage ; they were incurred in the present case for the common benefit, and before any separation of the interests by a transshipment of the cargo was contemplated. (*Phillips on Ins. vol. 2, § 1326.*) 4. The only remaining question is as to the sum of \$8769.74 for the temporary repairs ; it fol-

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lows from what has been said that the insurers are liable for all or none of this amount ; they have confessed their liability for the amount by a payment of a part of the sum, and the only objection made to the payment of the residue is that it exceeds the amount of their subscription ; this point has been disposed of. 5. But there is no necessity for relying upon this confession of the defendants ; the merits are clear. This item was an expenditure well established as belonging to *general average* ; and therefore stands upon precisely the same footing as the other claim for general average. It is true that there could not be a formal average, embracing all the interests ; for the cargo had been separated and sent forward. But this does not change the *nature* of the expenditure ; it shows only that the expenditure was solely for the benefit of the vessel, and to be borne by the underwriters on the vessel. 6. The separation of the cargo is not a circumstance of which the defendants can take any advantage. It was necessary that the cargo should be separated. Temporary repairs would not have sufficed to enable the vessel to carry the cargo. The defendants were apprised of the necessity of this separation, and assented to it. 7. The defendants would have been liable for the expense of the temporary repairs, even if they had never assented to them, on the general principles of insurance, but their complete assent, amounting in fact to a special request, removes the whole matter from the region of argument. 8. The case upon this last item, shortly stated, is this : The brig met with disaster and was compelled to put back. Her injuries were found to be so great that, considering the expensiveness of the port, she could not be repaired so as to be able to carry in the cargo, except at an expense which could not be justified. The cargo was therefore transhipped and sent forward. The question remained, what to do with the brig. The insurers were liable for the damage already done. That damage could not be fully repaired in the port of refuge, except at an expense which would exceed her value when repaired.

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The insurers could have been fastened with a total loss. *It was thought*, however, after full consideration, that temporary repairs could be made at a moderate expense, and the vessel thus brought to New York, where full repairs could be made and a total loss thus avoided. This view was presented to the defendants and they acquiesced in it, and requested it to be done. The thing was undertaken at their request and for their benefit, and would not otherwise have been done. Will it be pretended that they can escape the obligation to pay for these repairs in proportion to their interest? 9. Can there be any doubt, even, that an action would lie against them, wholly independent of the policy, to recover their proportion of this expenditure, as money paid at their request and for their benefit? This ground of liability is asserted by a special allegation in the complaint. 10. The event greatly disappointed the expectations of all parties, but there has been no breach of good faith on the part of the plaintiffs or their agents. The repudiation by the defendants of their obligation to repay moneys advanced at their request and for their benefit, finds a poor apology in the fact that they happened to be the heaviest sufferers in a common misfortune.

Fessenden in reply. The lines of divergence between the plaintiff's argument and ours are not many.

I. They say we admitted, by paying them the amount of our subscription, that all the items of their claim were proper subjects of recovery; and that when we claim that the amount they can recover is limited to the subscription, we are overruled by the cases in which more than the subscription was recovered; so that between our admission as to one factor, one constituent element of their claim, and the adjudications as to the other, we are concluded. The fallacy of this argument is that the present case is not like that upon which the decisions in question were rendered. We do admit all the items of their claim to be proper subjects for recov-

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ery to some amount, and to the amount although of \$8000 ; but the question is, whether to any, and if any what, further amount. The decisions say there are cases in which more than the amount of the subscription may be recovered. But they don't say so in any case like the present.

II. The plaintiffs argue to a considerable extent from cases in which there were *successive disasters*. In the case at bar there was but one disaster. It may well be, especially in the case of a time policy, that the insurer's contract is a continuing guaranty, applicable in full force, and to the full amount, to successive disasters ; and yet that the insurer is liable on account of any one injury for no more than his subscription. We relied on this distinctly, in our opening ; and we assert again that the authorities will be ransacked in vain for a precedent for the recovery of more than the insured sum on account of any loss or aggregation of losses, or of losses and expenses, occasioned by any one injury.

III. The plaintiffs consider the full repairs at New York the true loss, and the temporary repairs at Belize an expense "in the nature," their counsel says, "of general average." General average between what parties ? General average implies a contribution. Who were to contribute ? The general average expenses of getting the brig back to Belize, unloading, surveying, &c. had all been incurred. The cargo had gone on by another vessel. No parties remained interested but the insured and the insurer. Did any one ever hear of a general average contribution between them ? The insurer generally has to pay the whole ; as he has done in this case.

But waiving that matter, is it competent for the assured to separate the temporary from the full repairs, and make one an expense to be recovered under the expense clause, the other a true loss, to be recovered under the first clause of the policy ? Is it not plain that in a case like this, between only two parties, insured owner on one side and insurer on the other, the temporary repairs are mere preparation for

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the full repairs? The expense of stripping the vessel, preparatory to taking her upon the dry dock here in New York, might as well be separated from the rest of the full repairs; or the expense of fixing her pumps and pumping her out dry, before taking her up on the dock here. We have cited on our printed points two cases which hold distinctly with us on this point.

There are cases in which the *extra* expense of a more costly port, or of repairs which were of no permanent use, has been *separated* from other expenses, and considered general average; just as in this case the expense of getting back to Belize and unloading, surveying, &c. there were considered general average. This separation has not been made in this case. The insured has let the cargo and freight go, and, instead of claiming of us the *vessel's share* of these extra expenses, they claim the whole. It is too late for them to call any part of the temporary repairs general average. Their adjustment and claim treat them as repairs, and their complaint and their case on the trial treat them as repairs, to be settled between themselves and us, not at all between vessel, cargo and freight. Besides, there is really no evidence that the repairs at Belize were of no permanent benefit. They were temporary repairs, put on there only for the purpose of getting the vessel to New York; but it does not follow that no part of them was useful afterwards. It is very unlikely that no use was made of them.

IV. The plaintiffs call these repairs, or at least the full repairs, a loss, under the first clause of the policy, and not an expense. Suppose—what might well have happened, for this was an insurance for a whole year from July, 1863, and the disaster happened in September of that year—suppose that after this vessel was fully repaired at New York, she had immediately gone to sea and foundered in a gale before July, 1864. Then the plaintiffs would have called for their total loss, and doubtless they would have wanted to be paid for their full repairs in New York also. Their counsel would

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not then have called those repairs a *loss*. He would have looked at the cases he has cited, and would have carefully distinguished them as an *expense* incurred in the reparation of the insured subject; incurred, as said in the case cited from 10th *Johnson*, for the benefit of the insurer. The first clause in his policy being already used up in paying his total loss, he would never, in such a case, have thought of recovering his previous repairs also under that clause. With what propriety then can it be attempted now to recover those repairs under that clause?

V. The plaintiffs and ourselves have in general cited the same decisions. It is natural that we should differ in our construction of them. In such a case it is the most natural course, one obviously proper, to refer to the text writers of authority; persons of learning and discrimination, who have made it their business to understand the whole subject, and from a view of the whole form an impartial judgment of the true doctrine. All, as we read, put the same construction with us on the contract and law of insurance. All the continental writers are with us, and the chief of them, Emerigon, goes further, and thinks that the underwriter ought in no case to pay more than he has received premium for. In England Mr. Arnould, in this country Chancellor Kent and Mr. Phillips, all agree that only under the expense clause can the insurer be liable for more. (2 *Phillips' Ins. subds.* 1267, 1743. *Livie v. Jansen*, 12 *East*, 648. *Rice v. Homer*, 12 *Mass. R.* 234. *Knight v. Faith*, 15 *Q. B. Rep.* 649.) But while there is, as stated in the opening points, absolutely no precedent for the recovery of more than the sum insured, unless one of the items in the claim is a total loss, nevertheless we agree that we may be liable for proper *losses* to the full extent of our subscription, and under the same policy for proper *expenses* to another like amount. What we insist upon is, (a.) That under the expense clause, we are not liable for more than is expended in good faith and with reasonable discretion. (b.) That it can never be reasonable to

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expend more than the whole agreed value of the insured subject. (c.) That the items of the plaintiffs' claim are all properly expenses, and not losses; and were satisfied by our payment of \$8000, with interest and costs. (d.) That if the repairs are losses, the temporary and the full are to be taken together as one loss. (e.) That in that case the plaintiffs can recover for both of them but the \$8000; and the verdict ought to stand for the general average only.

By the Court, LEONARD, P. J. The action is upon a policy of marine insurance for the sum of \$8000, upon eight tenths of a brig valued at \$10,000. The brig sustained an injury from the perils of the sea, while upon the voyage insured, and, after incurring considerable expense, was brought into Belize, a foreign port from which the brig had then recently departed with a cargo bound to New York. Upon the adjustment of general average for the expenses incurred in bringing the brig and cargo to Belize, the share of the brig was found to be \$518.18.

The brig was very seriously injured, and it appears that repairs could be made at Belize only at an enormous expenditure, and the master by letter to the plaintiffs, stated these facts, and recommended temporary repairs, and that the brig should be navigated to New York, where permanent repairs could be made at much less cost. This information was communicated to the defendants, who authorized the plaintiffs to give the master instructions in the premises. The plaintiffs wrote to the master, instructing him to advise with Mr. Mathe at Belize, in making repairs, adding that whatever they did would be approved. The letter was shown to the defendants who, in writing, concurred in it. The repairs, considered to be of a temporary character, were made at Belize, involving an expenditure of \$8769.74, and after the arrival of the brig at New York, full repairs were made at a further expenditure of \$4547.21, after making the usual deduction of one third, new for old. The defend-

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ants paid the whole amount of their policy, (\$8000,) to the plaintiffs, with interest and costs, and insisted that they had satisfied the whole extent of their liability. The plaintiffs insist upon recovering not only the sum insured by the policy, but also the balance of their expenditures for general average and temporary and permanent repairs, exceeding the sum paid by the defendants, by the further amount of \$3282.23 ; for which sum the judge at the trial directed a verdict to be entered for the plaintiffs. The defendants excepted to the ruling of the judge, and the exceptions were directed to be heard at the general term in the first instance.

The right to recover for the expenses incurred by the assured in defending, saving and recovering property insured, in addition to the sum named in the policy, has been sustained, and is laid down as authority by the elementary writers, and in the series of English and American cases referred to by the learned counsel who ably argued the questions now before the court. Under these decisions, the proportion of the expenses borne by the brig under the adjustment of the general average, should, I think, be allowed to the plaintiffs. These expenses were incurred in bringing the vessel into a port of safety, and are covered by the terms of the policy which require the assured to sue, labor and travel in and about the defense, safeguard and recovery of the subject insured. The further expenses paid for temporary repairs at Belize were incurred in the expectation, probably entertained by both parties, that such repairs, together with the subsequent full repairs to be made at the home port, would amount to less than the sum named in the policy. They are not expenses incurred, as it seems to me very plainly, like the items included in the general average, in or about the defense, safeguard or recovery of the brig. When the vessel reached a port of safety, the general object of the contract, requiring the assured to sue, labor and travel for the benefit of the thing insured, had been accomplished. The temporary repairs were made from economical motives. Had full

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repairs been made at Belize, they must have exceeded very much the sum named in the policy. But in such case the recovery for repairs would have clearly, like the case of a total loss, been limited by the sum named in the policy. Again, it may be safely remarked, that there would have been no claim under the policy for the expense of the temporary repairs made at Belize, had the master or owners made them without the request or concurrence of the defendants. The defendants, however, did authorize the temporary repairs, and thereby, beyond dispute, made themselves liable therefor to the extent of the policy, at least, as part of the necessary cost of full repairs. The question, then, remaining is, whether the course pursued in this respect made the defendants liable for the whole amount of the temporary repairs, as well as the full repairs, although the amount in the aggregate exceeds the sum named in the policy, and for such excess no premium has been received by the defendants. It may be safely assumed that the plaintiffs would not have given, nor would the defendants have authorized, the temporary repairs, could they have known the result. The amount of the outlay must have been wholly unexpected to all parties. There is no ground for doubting that the expenditures were made by the master and Mr. Mathe in entire good faith.

In considering this subject, I observe that the contract is one of indemnity. The plaintiffs could gain nothing by having the repairs made at New York, as I understand the facts. We have no evidence of the actual value of the vessel; but for the purposes of the policy it was fixed at \$10,000, and of course \$8000 covered the whole interest insured, as to value. I assume that upon a survey and estimate of the expense for fully repairing at Belize, the plaintiffs might have abandoned, as for a total loss, and recovered from the defendants the sum insured, as well as the proportion of the general average borne by the brig. The defendants were the parties to be benefited in case a saving ensued

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from making temporary repairs, and bringing the brig to New York for full repairs. The plaintiffs took no hazard. They applied to the defendants for directions, and obtained them. Had the defendants refused to authorize the temporary repairs, it appears improbable that the plaintiffs would have ordered them. The plaintiffs departed from their strict legal course only upon the authorization of the defendants.

These reasons lead me to the conclusion that the repairs were made at Belize for the sole benefit of the defendants ; and that, having authorized them, and thereby induced the plaintiffs to take the course suggested by the master, they must bear the whole expense of the temporary, as well as the subsequent repairs made at New York.

Judgment should be entered for the plaintiffs upon the verdict, with costs.

[NEW YORK GENERAL TERM, June 3, 1867. *Leonard, Clarke and Geo. G. Barnard*, Justices.]

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HEATH vs. BARMAN.

Where land which had never been a highway was taken by a plank road company for the purposes of its road, the same being either donated to the company, or purchased and paid for by it, and the plank road company was subsequently dissolved, and its road abandoned, whereupon the commissioners of highways of the town claimed the land for a highway, and continued to use it as such ; *Held*, that although the plank road company was a private corporation, all lands taken by it were for *public use* ; and that the use to which the land in question was now devoted, to wit, a highway, being also a *public use*, was not such a *change* of the use as to justify the original owner of the fee in taking possession of such land in default of a new compensation to him.

The statute of 1854, authorizing a plank road company to abandon its road, or portions of it, and providing that, thereupon, the road shall cease to be the road or property of the company, and revert and belong to the several towns through which it was constructed, should be construed as meaning plank roads constructed upon lands, though they had not previously belonged to the town, or been used for highways. Such lands are to pass to the towns as highways.

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Though the *reversion* in the lands taken for a plank road was and still continues in the original owner of the fee, yet the land having been lawfully taken for public use, the *title*, by the act of the original taker, and by force of the statute, passed to the town, upon the abandonment of the road, the same public use, in substance, being preserved.

THIS was an action for trespass on land, and was tried by the court, at the Chautauqua circuit, in January, 1867.

A. Hazeltine, for the plaintiff.

C. B. Lockwood, for the defendant.

MARVIN, J. I have examined the evidence, and the briefs and arguments of counsel, and without here stating the history or the facts relating to the title of the *locus in quo*, I will simply say that I think the title of the plank road company, as against the plaintiff, was sufficient to defeat his action.

Under the Code, the equitable rights of the parties, as well as legal, are to be considered. This will bring us to the more difficult and important question in the case. The plank road company was dissolved seven years ago. It ceased to maintain the plank road, and the town of Gerry, or the commissioners of highways of that town, thereupon claimed the *locus in quo* for a highway, and have used it as such. Is this claim valid, or has the land reverted to the plaintiff, the fee owner, discharged of any burden in behalf of the public? It was taken by the plank road corporation for the purposes of its road, and for no other purpose. It had never been a highway. It was either donated to the corporation, or purchased and paid for by it. In short, as to the corporation, the provision of the constitution inhibiting the taking of private property for public use, without just compensation, was satisfied.

But it is argued, that it was taken for a certain defined purpose, and by a certain corporation, and that the purpose

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cannot be changed ; and that the town of Gerry, or the public, cannot succeed to the rights of the corporation ; and cannot, in short, enjoy the land for a highway without acquiring this right from the plaintiff by making just compensation. There is no difficulty upon the question of compensation. That has been made. The difficulty, if any exists, has reference to the *use* to which the road, when taken by the corporation, was to be devoted — the burden or servitude imposed upon it.

The land was taken for a public use, though the plank road company was a private corporation. All lands taken by it were for *public use*. This has often been so decided, in reference to railroads and plank roads, &c. The use to which the land is *now* devoted is a *public use*. It is now claimed and used as a highway. The question is to turn, I think, upon the *character* of the *use*. In *Williams v. The New York, &c. Railroad Co.*, (16 *N. Y. Rep.* 97,) it was held that a railroad could not be constructed and used upon a highway without the consent of the fee owner, or making compensation to him. That the construction of the railway upon the highway was the imposition of a new, different and additional servitude ; and the question was made to turn upon the character of the public servitude or easement. Judge SELDEN (page 111) says : "The dedication of land to the use of the public, as a highway, is not a dedication of it to the use of a railroad company ; that the two uses are essentially different ; and that, consequently, a railway cannot be built upon a highway without compensation to the owner of the fee." Ch. J. Shaw, in 4 *Cush.* 63, speaking of railroads and highways, says : "The two uses are almost, if not wholly, inconsistent with each other, so that taking a highway for a railroad will nearly supersede the former use to which it had been legally appropriated. The whole course of legislation, on the subject of railroads, is opposed to such a construction." It was upon these grounds that these cases were decided. (*And see the Presb. Society of Waterloo v. The Auburn and Rochester Railroad Co.*, 3 *Hill*, 567.)

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It is not denied that the *public use* may be somewhat modified. I have never heard it suggested that the legislature transcended its powers when it authorized plank road companies to substitute *gravel* for *plank*.

After reading the above, and some other cases, I have come to the conclusion that the public use to which the land in question is now devoted, to wit, a highway, is not such a change of the *use* as to justify the plaintiff in taking possession of the land, in default of a new compensation to him. The plank road was a highway. All persons could use it. The land is now used by the public, for a highway, precisely as the public used it when it belonged to the plank road company. The easement, so far as the public is concerned, is the same. The present servitude is no more onerous or injurious to the plaintiff than the former. There is a slight difference as to the public. The plank road company was bound to keep the road in repair, and it was authorized to receive tolls from those who used it. Now the public keeps the road in repair, and its use is free.

It is argued that the statute of 1854, (*Laws of 1854, ch. 87*), is not broad enough to include the case, and to give the use of the road to the town or public. The statute authorizes a plank road company to abandon its road, or portions of it, and specifies the evidence of such abandonment, and provides that thereupon the plank or turnpike road, or the portion thereof so surrendered, shall cease to be the road or property of the company, and *revert* and *belong* to the several towns through which it was constructed. The words are *revert* and *belong* to. I think the statute should be construed as meaning plank roads constructed upon lands, though they had not previously belonged to the town, or been used for highways. Such lands are to pass to the town as highways. In this case the reversion, as argued by counsel, was and still is in the plaintiff, but as the land had been lawfully taken for public use, the title, by the act of the

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original taker, and the statute, has passed to the town, the same public use, in substance, being preserved.

The question has been raised as to the duration of this right in the town. Indeed it is argued by the plaintiff's counsel that the plaintiff has a vested remainder in the land, and that the statute, if it gives the land to the town for a highway, has taken from him that vested remainder, and that the legislature cannot do this without compensation. It is undoubtedly a sound position that the legislature cannot take any kind of private property for public use, without just compensation. But can this question arise between the plaintiff and the town, until the expiration of the time limited in the charter of the plank road, for its existence? Waiving this question, however, is it quite clear that the plaintiff had a remainder, which is to come to him at a time certain? I certainly doubt it. The question to which I refer has not been discussed, and I will barely refer to it. The legislature has power to alter, repeal or amend the general plank road act, under which the plank road company now in question was organized. It could undoubtedly so amend the act as to authorize the corporation to prolong its existence; or it could, by an act, extend its corporate existence. Would not such extension carry with it the right to enjoy its lands for public purposes? I think it would. The grantor of the land, at the time he made the grant, made it in reference to the right of the legislature to prolong the existence of the corporation. It is to be noticed that no limitation, as to time, is contained in the grants to the plank road company. But it is not necessary to pursue this question.

I notice that the legislature, as early as 1838, enacted a statute providing that when a turnpike company should become dissolved, or the road discontinued, its road should become a public highway. (*See vol. 3 Stat. at Large, 549.*) Cases must have existed where the turnpike company acquired the right of way, outside of highways. No provision is

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made for compensation to the original owners. The legislature did not deem it necessary.

As to the entry upon the plaintiff's meadow for the purpose of removing the bridge timbers that had been carried away by the flood, I was of the impression that this entry might be justified under the idea of a right to enter the premises of another to remove the property of the party entering, but I do not find authority for such entry, and counsel have referred to no cases in point. A tender of amends sufficient in amount was made, but I do not understand the statute as embracing the case. It is not a case of "casual or involuntary trespass." The plaintiff must, therefore, have a judgment for these damages, which I assess at \$3.

[CHAUTAUQUA SPECIAL TERM, January 14, 1867. *Marvin*, Justice.]

Matter of the NEW YORK CENTRAL RAILROAD COMPANY, to appraise land, vs. THE BUFFALO AND NEW YORK AND ERIE RAILWAY COMPANY.

The Buffalo, New York and Erie Railroad Company, by a lease dated February 27, 1863, demised, for the term of 490 years, to the New York and Erie Railroad Company "the railroad of the party of the first part, including its branch freight track, and all the land of the party of the first part situate within and from the city of Buffalo to and within the village of Corning * * * upon or across which its said railroad or any part thereof, or its machine shops, warehouses, freight or passenger depot buildings, car houses, engine houses or other shops or buildings are constructed, within or between the places aforesaid, and all the rights, title and interest which the said party of the first part has in or to the use of any wharves or docks in said city, or in or to any other branch track or tracks used by or in connection with the said railroad, together with the appurtenances thereunto belonging." At the date of this lease a strip of land 240 feet in length by 30 in breadth, situate in Buffalo, the title of which was in the lessor, was in the actual possession of another railroad company, and had been for some ten years, and was used by the latter company for its tracks and other railroad purposes. It had never been used by the lessor in connection with the operating of its railroad, nor was it necessary for that purpose.

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Held, that the strip in question was not included in the description of the thing demised, viz. the "railroad" of the lessor; nor was it embraced by the words "all the lands" of the lessor "upon or across which its said railroad," &c. "are constructed," the railroad not having been constructed upon or across it; nor did it pass as an *appurtenance* to the railroad of the lessor. Land cannot pass, by a conveyance, as appurtenant to land.

APPEAL from an order made at a special term confirming the report of a referee, giving the money in court, \$14,500, to the New York and Erie Railroad Company. This money was the award of damages to be paid by that company for land taken by it for its railway purposes, in the city of Buffalo; and the money is claimed by the New York and Erie Railway Company, and also by the Buffalo and New York and Erie Railroad Company.

The title to the land taken was in the Buffalo and New York and Erie Railroad Company, subject to the right of the New York Central Railroad Company to have the premises opened, used and appropriated for the purposes of a highway. The latter company was in the actual possession of the premises, and had been, for some ten years prior to the making of the lease hereinafter mentioned, using them for its tracks and other railroad purposes. The Buffalo, &c. Railroad Company was in possession of and occupied the premises north of the parcels in question, excepting a small parcel not important in this case, extending to Exchange street and from Chicago street on the east, to Michigan street on the west. This parcel of land being 110 feet in width. The parcels of land taken by the Central were thirty feet in depth, north and south. The Central Railroad Company had constructed, many years before the lease in question, a high, tight board fence on the north line of these parcels of land possessed and occupied by it, and had maintained such fence. This fence separated and marked the *possessions* of the two companies, to wit, the New York Central Railroad Company and the Buffalo, New York and Erie Railroad Company.

The latter company, by a lease dated February 27, 1863,

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demised for the term of 490 years to the New York and Erie Railway Company, &c. "the railroad of the party of the first part, including its branch freight track and all the land of the party of the first part situate within and from the city of Buffalo to and within the village of Corning, in the county of Steuben, upon or across which its said railroad, or any part thereof, or its machine shops, warehouses, freight or passenger depot buildings, car houses, engine houses or other shops or buildings are constructed, within or between the places aforesaid, and all the rights, title and interest which said party of the first part has in or to the use of any wharves or docks in said city, or in or to any other branch track or tracks used by or in connection with its said railroad, together with the appurtenances thereunto belonging."

The referee awarded the money, subject to the rights of certain mortgagees, to the New York and Erie Railway Company, the lessees of the Buffalo, New York and Erie Railroad Company, and the special term affirmed the report, and the Buffalo, New York and Erie Railroad Company appealed to the general term.

Sherman S. Rogers, for the appellant.

John Ganson, for the respondent.

By the Court, MARVIN, J. The question made and argued upon this appeal is, did the land in question pass to the Erie Railway Company under the lease of February, 1863? Or, in other words, did the Erie Railway Company, by this lease, acquire all the right and title of the Buffalo, New York and Erie Railroad Company, in and to the parcels of land in question, for the term of the lease? If so, then the order appealed from should be affirmed; otherwise, it should be reversed.

We start with the facts that when the lease was made, the premises were not possessed or occupied by the Buffalo,

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&c. Company, nor had they been for some ten years, if ever; and that they were possessed and occupied exclusively by the Central Railroad Company, for railroad purposes. Did these parcels of land (call them a strip of land some 240 feet in length, by some 30 in breadth,) constitute any portion of "the railroad of the party of the first part" the lessor? Or land "upon or across which its said railroad, or any part thereof," &c. was constructed? Or was this land an "*appurtenance*" to such railroad?

The words "the railroad of the party of the first part" are undoubtedly the broadest and most comprehensive of any contained in the description. They include the realty belonging to the lessor, which had been used, or which it was necessary to use, in operating the road. A demise of a mill, with the appurtenances, passes both the water and the piece of land used in connection with the mill. The grant of a mill includes the site, dam and other things annexed to the freehold, necessary to its beneficial enjoyment. (*Hilliard on Real Estate*, vol. 2, p. 112, §§ 8, 9, and the cases cited. *Ashley v. Pease*, 18 Pick. 275. See also 2 Saund. 401, note 2.)

In this case, the thing demised was the "railroad." It had never been used in connection with the operating of the railroad, nor was it necessary for such purpose. In my opinion, this strip of land was not embraced in the description "the railroad" of the lessor. Is it embraced by "all the lands" of the lessor "upon or across which its said railroad," &c. "are constructed?" Clearly not. The lessor's railroad had not been constructed upon or across the land in question; nor had any buildings, &c. been so constructed by, or for, the lessor. This part of the description does not include the strip of land in question. Was this strip of land an *appurtenance* to the railroad of the lessor? I am not able to see that it was, in any sense. Appurtenance is something appertaining to another thing as principal, and which passes as an incident to the principal thing. Lord Coke says, (*Co. Litt.* 121 b,) "A thing corporeal cannot properly be appurtenant to a

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thing corporeal, nor a thing incorporeal to a thing incorporeal." According to this rule, land cannot be appurtenant to land. (*Harris et al. v. Elliott*, 10 *Peters*, 54.) In *Jackson v. Hathaway*, (15 *John*. 454,) the court say, a mere easement may, without express words, pass as an incident to the principal object of the grant, but it would be absurd to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel which is expressly granted by precise and definite boundaries. (*See also Leonard v. White*, 7 *Mass. R.* 8 and 9.)

If the New York and Erie Railway Company acquired any interest in the strip of land in question, it acquired it by its being included in the description of the thing demised, and not as an appurtenance to such thing. I have endeavored to show that the land was not included in the description of the thing demised. The strip of land in question was land in the possession and occupancy of the New York Central Railroad Company, and it was not an *appurtenance* belonging to the Buffalo, New York and Erie Railroad Company.

I am not sure that I should not notice another phase of the case. The title of the land was in the Buffalo, New York and Erie Railroad Company subject to a right in the New York Central to have the premises opened and used as an alley, or highway; and at the time the demise was made (February, 1863,) the Buffalo, New York and Erie Railroad Company had instituted an action to compel the opening of such alley or highway, claiming its right to have such street opened; and the Central Railroad Company had instituted proceedings by which to acquire title to the land, for the use of its road; and these proceedings resulted successfully, and produced the money in question.

It may be said that the *lessor* had, at the time the lease was made, the right to compel the opening of a street along on the south side of the land it was using, and that such street would have been an easement pertaining to the land it used.

Bell v. Town of Esopus.

Now these facts, and the position, may, for the purpose of our present inquiry, be conceded, and the answer will be that the right in the lessor was not an *appurtenance* belonging to the "railroad" of the lessor at the time the lease was made; and there is nothing in the description embracing this right. The lessor did demise "all the rights, title and interest which" it had "in or to the use of any wharves or docks in said city, or in or to any other branch track or tracks used by it in connection with its said railroad." In short, there is no language in the lease under which the Erie Railway Company can claim any right or interest in this strip of land, and the language used was well adapted to the exclusion of this land, or any interest which the lessor had in it, if such was the intention. The question for the court is the ascertainment of the intention of the parties from the language used, applying the well settled rules of construction in such cases. If the parties to the lease had any other intention, and the instrument executed by them does not carry into effect their agreement, the remedy is to be found in an action to reform the instrument.

The order of the special term should be reversed, and the money should be awarded to the Buffalo, New York and Erie Railroad Company, subject to the rights of others as ascertained and declared by the report of the referee.

[ERIE GENERAL TERM, May 6, 1867. *Daniels, Marvin and Davis*, Justices.]

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BELL and others, executors, &c. *vs.* THE TOWN OF ESOPUS.

An action will not lie against a town, to recover a claim arising upon contract. Parties who contract to render services for either town or county do it with a knowledge that their remedy, to procure payment is through the action of the board of supervisors. Where that body neglect or refuse to discharge a duty fairly imposed by law, performance will be compelled by mandamus.

Bell v. Town of Esopus.

THIS is a motion for a new trial, upon exceptions ordered to be heard in the first instance at general term. The action was tried at the Ulster circuit on the 27th day of March, 1865, and the plaintiffs were nonsuited.

T. R. Westbrook, for the plaintiffs.

J. Hardenbergh, for the defendants.

By the Court, INGALLS, J. In my judgment there is an insurmountable obstacle in the way of a recovery by the plaintiffs in this action, which is that the action cannot be maintained against the town of Esopus to recover the money in question. Neither the statutes of 1853 or 1854 provide a remedy by action against the town; and the current of judicial determination in this state has been nearly, if not wholly, unbroken against the maintainance of such an action. It rests upon principle; for to allow actions of this nature to be prosecuted to recover *claims arising upon contract*, against towns or counties, would create endless litigation. Certainly there is no serious hardship in adhering to a rule so well established and so wise in itself. Parties who contract to render services for either town or county do it with a knowledge that their remedy to procure payment is through the action of the board of supervisors. Where such body neglect or refuse to discharge a duty fairly imposed by law, performance may be compelled by mandamus. (*Brady v. Supervisors of New York*, 2 Sandf. 460; affirmed by Court of Appeals, 10 N. Y. Rep. 260. *The People v. Supervisors of Ulster County*, 3 Barb. 332. *The People v. Edmonds*, 15 id. 529. *The People v. Supervisors of Livingston Co.*, 43 id. 298. *The People v. Supervisors of New York*, 32 N. Y. Rep. 473. *Martin v. Supervisors of Greene Co.*, 29 N. Y. Rep. 645.)

If we are correct in this position it is conclusive in this

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case, and renders the examination of the other questions raised upon the trial unnecessary. A new trial must be denied, with costs.

[ALBANY GENERAL TERM, May 6, 1867. *Peckham, Ingalls and Hogeboom, Justices.*]

THE BANK OF THE COMMONWEALTH *vs.* VAN VLECK and
TUCKER.

Where the plaintiffs loaned to the defendants \$10,000 in gold, and the latter agreed to repay the loan in gold, and repeatedly, afterwards, promised to return gold to that amount; *Held* that the act of congress, commonly called the legal tender act, did not apply to the transaction; and that the plaintiffs were entitled to damages for a breach of the contract in not returning the \$10,000 in gold. (WELLES, J. dissented.)

Held, also, that the plaintiffs had not released the defendants from the obligation of the contract, by receiving from the latter their check for \$10,000, on which they received the money in legal tender notes, crediting the check to the defendants in their general account; where it appeared that the check was received as a deposit, like any other deposit, and that the plaintiffs did not intend, by receiving it, to satisfy or discharge the defendants' obligation under the contract.

Where a person, since the passage of the legal tender act, promises, for any valid consideration to return gold or silver, instead of the national currency, he is bound to return those specific things, precisely as he would be bound to return a specific quantity and quality of cotton, if he had, for a valid consideration, promised to do so. *Per* CLERKE, J.

THIS action was brought to recover damages for a breach of contract. The complaint alleged, 1. That the plaintiff at the several times hereinafter stated was, and ever since has been, and still is a body corporate, created by and under the laws of the state of New York; duly organized, pursuant to an act of the legislature, entitled "An act to authorize the business of banking," passed April 18th, 1838, and the acts amending the same, having their banking, house and place of business in the city of New York. That on the

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1st day of September, 1862, at the city of New York, the defendants were, and for some time previous thereto had been and ever since have been and remained, and still are co-partners in trade and business as bankers and brokers, having their office and place of business in said city of New York, and during the time aforesaid, said defendants as such co-partners have done business with, and have kept a bank account with said plaintiffs, the Bank of the Commonwealth. That on or about the 1st day of September, 1862, at the city of New York, and while said defendants were such co-partners as aforesaid, and while keeping a bank account with said plaintiffs as aforesaid, the defendants entered into an agreement with the plaintiffs in substance as follows, that is to say: that if the plaintiffs should and would loan and advance to the defendants, for the term of a few days, the sum of ten thousand dollars in gold coin, that the defendants would deposit with said plaintiffs the said defendants' check for the sum of \$10,000 upon the said Bank of the Commonwealth, against any funds which said defendants then had, or might thereafter have in said bank, payable in the currency of the United States, commonly called legal tender notes, as security for the return of said sum of \$10,000 in gold coin. And that said defendants would, within a few days then next thereafter, and upon demand, return to said plaintiffs the said sum of \$10,000 in gold coin as aforesaid. And thereupon in consideration thereof the plaintiffs did then and there loan and advance to said defendants, to be returned as aforesaid said sum of \$10,000, in gold coin, and took from said defendants as security therefor their check for the sum of \$10,000 payable in currency or legal tender notes as aforesaid. And the defendants then and there accepted and received the said sum of \$10,000 in gold coin upon the terms above specified. And in consideration thereof then and there undertook, promised and agreed to, and with the plaintiffs, that they, the said defendants, would, within a few days, and at any time upon demand, return to said plaintiffs the

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said sum of \$10,000 in gold coin as aforesaid. And the plaintiffs further alleged that at the time of the loan and advance of said gold as aforesaid, the same was actually, and in fact, worth much more than its par value, to wit, a premium of from seventeen to twenty cents on each and every dollar thereof, over and above its nominal par value in legal tender notes, and soon thereafter the value of said gold coin became, and was greatly enhanced, and the same was actually worth, and readily sold for a premium of seventy-two cents on each and every dollar thereof, amounting in the aggregate to the sum of \$17,200. And the said check of said defendants was not then, nor has it at any time since been worth any more than \$10,000 in the paper currency of these United States, commonly known as legal tender notes. That soon after said 1st day of September, 1862, and at divers times since then, the plaintiffs by themselves and their duly authorized agents, have duly demanded of said defendants the return of said sum of \$10,000, in gold coin, pursuant to the terms of the aforesaid agreement on the part of said defendants ; and the defendants, from time to time, upon such demands as aforesaid, acknowledged their obligation to return the same, and from time to time promised so to do, but asked for a few days further time in which to make such return, which was accorded them upon such renewed promise to return the same, till on or about the 18th day of December, 1863, when the plaintiffs caused an absolute demand to be duly made upon said defendants for the return of said gold coin ; that at the time of said demand as last aforesaid, the said gold coin was actually, and in fact, worth the sum of \$17,200 in the paper currency of these United States, commonly called and known as legal tender notes. And the plaintiffs then might, and could have realized and received for the said sum of \$10,000 in gold coin, if said defendants had kept and performed their said agreement in respect to said return thereof, the just and full sum of \$17,200 in the paper currency of the United States as aforesaid ; but the defendants have wholly

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neglected to return the same or any part thereof, and now wholly refuse to return the same or any part thereof, contrary to the form and effect, true intent and meaning of their said contract, or to pay or give said plaintiffs any other or greater sum or consideration therefor, than the aforesaid check of \$10,000; to the damage of said plaintiffs of said sum of \$7200 over and above the amount of said check. Wherefore, the plaintiffs demanded judgment against the defendants as such co-partners as aforesaid, for said sum of \$7200, and interest thereon, besides costs.

The defendants, by their answer, admitted that they were partners in the banking business, as alleged in the complaint; that they had for a long time dealings with the plaintiffs, and kept a bank account with them, and they alleged that before or soon after the commencement of the plaintiffs' action, and before the making of this answer they had settled with the said plaintiffs in full; that their account was balanced and closed, and the plaintiffs paid over to them the balance due to them, and all matters as between the plaintiffs and the defendants were fully settled and adjusted. They denied that any contract, such as set forth in the complaint, was ever made with the defendants, or that they are liable upon any contract or arrangement at any time made with the plaintiffs, or that any contract ever made by the defendants with the plaintiffs by them remains unperformed. And they averred that if the plaintiffs ever paid any check of theirs in gold in place of currency, it must have been at a time when the plaintiffs were indebted to the defendants, and that in case any such payment was ever so made by the plaintiffs, it was not so made on any contract or assurance upon the part of the defendants that they would re-deposit with said plaintiffs the same amount at some future time, in gold; and the defendants denied that they ever made any promise or assurance whatever to the plaintiffs to return to them any gold that was not so returned, long before this action was commenced. And they denied that by reason of any obligation in the com-

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plaint contained, the plaintiffs had any cause of action against them, or that they were liable to the plaintiffs in any sum whatever, as damages, or otherwise. Wherefore they demanded that the plaintiffs' complaint be dismissed, and for judgment against said plaintiffs, and for the costs and disbursements of this action.

The action was, by consent of parties, tried before Justice J. F. BARNARD and a jury. The justice found the following facts, viz: That the plaintiffs are a banking corporation duly organized under the laws of the state of New York; that on the first day of September, 1862, the plaintiffs loaned to the defendants \$10,000 in gold; that defendants agreed to repay said loan in gold; that the premium on gold was then 17 per cent; that on or within a few minutes after the loan the defendants delivered to the plaintiffs their check in the usual form of bank checks, and not specifying that the same was payable in gold, for \$10,000; that the plaintiffs received the money on said check on presentation of the same, in legal tender notes of the United States; that the defendants have repeatedly, since said loan to them, promised to return gold to the amount of said loan, and have never done so; that the highest premium upon gold since the loan, and before this trial has been 185 per cent, which was on the . . day of . . . 1864; that on the 9th of December, 1865, the defendants directed the plaintiffs to write up their bank book, with a view to close the account of the defendants with said bank; that this was done, and there was a balance of about \$700 due the defendants, for which they drew their check, and the same was paid by the plaintiffs. That the \$10,000 received upon the defendants' check for said loan, was retained by the plaintiffs, and the defendants' check for balance, was for balance due the defendants over and above the \$10,000 check given upon said gold loan. That the account so settled was made up exclusively of the defendants' deposits on one side, and the drafts against these deposits on the other, and did not include any charge of gold or premium

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on gold, to the defendants; that the settlement of the accounts consists solely in writing up the defendants' pass book, ascertaining the balance of deposits over drafts, by the book-keeper of the bank, in the ordinary course of business, and the payment by the bank of the defendants' check for said balance in the ordinary course of business, and that there was no notice taken of said loan in said settlement between the plaintiffs and the defendants beyond the charge of said \$10,000 checks to the defendants' account. That after the payment of said balance on said checks, to wit, on the 18th December, 1863, the cashier demanded the return of the gold, and the defendants promised to return it. That after the commencement of this action, to wit, in the month of September, 1865, the defendant Van Vleck, again acknowledged it, and promised to adjust the defendants' liability on said gold loan. That the plaintiffs appropriated and held the \$10,000 drawn by, and the proceeds of said check of the defendants, but did not intend thereby to satisfy or discharge the defendants' obligation under the contract by which said gold was borrowed.

And his honor found as conclusions of law, from the above facts, that the plaintiffs were not entitled in law to recover any premium upon said gold loaned; that the loan was legally repaid to said bank, and that the defendants were entitled to recover the costs against the plaintiffs in this action. And that the defendants were entitled to judgment therefor, with one hundred dollars commission.

The plaintiffs' counsel excepted to each of such conclusions of law, and judgment being entered, the plaintiffs appealed to the general term.

J. M. Van Cott and *E. A. Doolittle*, for the appellants.

I. The plaintiffs concede that an ordinary debt can be discharged by a payment in legal tender notes.

II. Gold coin and notes are not legally identical, except in cases of pure debt, or where they are made so by express con-

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tract. 1. One who tortiously converts 1000 ten dollar gold pieces when gold is at a premium, is liable to the owner for the actual *market value of the gold*. And gold coin and gold in bars would be governed by the same rule. 2. So on a *sale* of a bag of gold, the purchaser in an action for non-delivery, would recover *its market value*. 3. So on an *exchange* of a bag of ten dollar gold coins for a bag of five dollar gold coins, and a delivery by one party and a failure to deliver by the other, the latter would be liable for the *value* of the gold. So on a sale of exchange, on non-performance, the buyer can recover the market value.

III. Contracts based upon the different values of gold and paper money, under which gold is delivered by one party on an express agreement made by the other party, to return gold, or the *value* of gold in some other medium of payment ; for example, in grain, or flour, or exchange, are not within the letter or policy of the legal tender act. The federal legislation recognizes the distinction between gold and paper money. It provides for the payment of some federal debts in gold. It also provides that certain dues to the government shall be paid only in gold. This federal legislation created the necessity for the purchase and sale of gold, to buy its own gold bearing securities and to pay the dues to itself which gold alone could discharge. It necessarily results, that contracts to buy and sell gold are lawful ; and that they are to be construed and enforced like other contracts, according to their import and the intentions of the parties. It would be monstrous to say, that the merchant must buy gold to pay his dues to the government, but that he is not bound to pay the seller its stipulated price. If a party were to borrow gold on his stipulation to return it in kind, with a secret intention not to repay it except in a depreciated paper medium, the common moral judgment of mankind would stigmatize him as a knave. The federal statutes were not designed to legalize such knavery.

IV. The distinction insisted upon between ordinary debts,

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and contracts based upon an existing and notorious difference in the value of gold and of paper, has been recognized in various cases. (*Luling v. The Atlantic Mutual Ins. Co.*, 45 Barb. 510. *Rodes v. Bronson*, 34 N. Y. Rep. 649, 653, 656. *Taylor v. Ketchum*, N. Y. Times, Feb. 23, 1847.)

In *Luling v. The Atlantic Mutual*, this court held, that where policies were issued for gold premiums, and stipulated for payment of losses in gold, the transaction and all its incidents were taken, out of the legal tender act. In *Taylor v. Ketchum*, bankers were held by the Superior Court for the value of gold deposited by a customer. In *Rodes v. Bronson*, the Court of Appeals, in applying the legal tender act to a mortgage made in 1861, when gold and bank paper were equivalent convertible values, carefully distinguishes the case of an express contract to pay gold, made when gold and paper money were of unequal values. "The case of an agreement made since the act of 1862, for the payment of a specified sum in coin, in consideration of a loan in coin, or upon any other equivalent consideration, and in view of the difference in market value existing at the time between coin and treasury notes having the same legal value, may differ materially from the present case. The validity of such an agreement, for some purposes at least, is distinctly recognized by the act itself, and, in many cases, contracts of that character may accord with, and even aid, the policy of the statute."

V. Substantially, this transaction was the loan of a commodity on an agreement to return it in kind, and for the breach of that agreement the borrower is liable for the market value of the commodity wrongfully withheld.

B. F. Sawyer, for the respondents. I. Admitting the allegations in the plaintiffs' complaint to be true, they cannot recover for the following reasons, viz: 1. That said bank by the terms of the general law under which they became a body corporate were bound to *redeem their bills and pay off their indebtedness* to their depositors in their own bills or

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specie, and such bills were at all times *immediately convertible into specie*. 2. That the plaintiffs, having suspended specie payments, contributed to the enhancing or the creating of a speculative value for gold coin, and induced the premium on the same. That such suspension of specie payments was without warrant of law, and has never been legalized, and the plaintiffs ought to be estopped from claiming any profit or benefit resulting from *their own wrong or illegal act*. 3. That it is not within the power or authority conferred upon a bank to speculate in gold or silver coin. They can own it, or receive it on deposit, but it is of no greater value than their own bills; both are presumed to be of par gold value, *and in paying out such coin upon an indebtedness they cannot demand or receive a premium*.

II. The plaintiffs admit that when they delivered or paid to the defendants \$10,000 in gold coin upon their check they (the plaintiffs) received of the defendants after such delivery \$10,000 in the legal tender currency of the United States for the same. Such notes by act of congress are made equal to gold or silver, and are made legal tender for the purpose of paying off any indebtedness, except "*custom dues*," or bonds and coupons payable in gold.

III. Had no such payment been made in legal tender notes for said \$10,000 of gold coin, and the bank had subsequently brought suit for the same, a tender of the amount at par in the legal tender notes of the government would, in point of law, have discharged the debt, and operated as a bar to the right of the plaintiff to have recovered a larger sum. It would have been simply an indebtedness for \$10,000, and as such \$10,000 in legal tender currency would have discharged it—*the value of each being the same by act of congress*.

IV. It is difficult to conceive upon what principle this court can make any distinction between the two kinds of money, as the act of congress has fixed their value and made legal tender notes as valuable, dollar for dollar, as gold.

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V. What amount of such *legal tender notes* a party might have obtained for \$10,000 in gold coin, September 1, 1862, or December 31, 1863, by a sale or exchange of the same in the market, has nothing to do with the case at bar, for the reason that the defendants never proposed to purchase gold at the market price payable in currency, or the plaintiffs to sell the same. The defendants, at most, got of the bank \$10,000 in gold coin upon their check drawn upon the plaintiffs' bank for a like sum payable in legal tender notes, which they (the defendants) had on deposit with the plaintiffs, and the plaintiffs received the same; which was, in fact, full payment.

VI. If the plaintiffs were ever entitled to recover at all, they could not in the manner and form set out in their complaint, for the reason that they sue for a difference or premium in gold coin over and above legal tender notes, and by the law of the land no such difference or premium exists. If any action could have been maintained upon the contract, as they have alleged in their complaint, and upon their own showing, they should have tendered to the defendants the \$10,000 of legal tender currency, and demanded a return of said gold coin, and, on the defendants' refusal, brought an action for the return of the same; *for a specific performance of said contract, i. e. a return of said gold.*

VII. The fact that the defendants' account was settled in the usual and ordinary manner of settling such accounts, does not help the plaintiffs. Had this settlement taken place between merchants, in their usual and ordinary way, neither party, in such a case as the one at bar, could have recovered as against the other.

VIII. This case is not analogous to the one cited by the counsel for the plaintiffs on the trial of this action, for the reason that it was based upon a contract made with a broker or dealer in gold who made a specific contract in writing for the purchase of gold and for the delivery of the same. *Here there is no pretense of sale or purchase.* The plaintiffs, as they allege, lent \$10,000 in gold, to be returned, and fifteen

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minutes after received \$10,000 in legal tender notes of the United States, which were by act of congress of equal value. The two cases are wholly unlike.

IX. If the plaintiffs had regarded that \$10,000 gold coin as a loan, and they had a legal right to claim the same, or the premium thereon, would they, after notice that the defendants intended to close their account, and their pass-book had been left for that purpose several days previous, have *paid such balance until a settlement had been made for the premium?*

X. *As to the measure of damages*, if the court believes the plaintiff can recover at all, we say it should be the price of the gold at the time of delivery; certainly it could not be in excess of the amount claimed in their complaint, to wit, \$7200. *The act of congress, passed February 25, 1862, making certain treasury notes of the United States a legal tender in payment of debts between private persons, is constitutional and valid. (Metropolitan Bank v. Van Dyck, 27 N. Y. Rep. 400. Hague v. Powers, 39 Barb. 427. Roosevelt v. Bull's Head Bank, 45 id. 579. Kimpton v. Bronson, Id. 618.)* No doubt can now be entertained as to the validity or effect of payment, or tender of payment, in the currency commonly called "*legal tender notes*," issued under and by virtue of the law of congress, February 25, 1862. (*Vol. 12, U. S. Stat. at Large, p. 711.*) This act has made such notes lawful money, and a legal tender in payment of all debts, public and private, within the United States. It has been held that a contract for the payment of a sum in gold and silver dollars is satisfied by payment in such *legal tender notes*. (*Wilson v. Morgan, 1 Abb. Pr. N. S. 174. Kimpton v. Bronson, 45 Barb. 618.*) Congress, by the passage of that act, has made a paper dollar the equivalent of a gold or silver dollar. That act has left nothing to the discretion of courts; it has rendered such currency nominally, for all legal purposes, equal to gold, and *in legal contemplation no difference exist between them.* (*Wilson v. Morgan,*

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1 *Abb. Pr. N. S.* 174.) It has been held that a charter-party, made in a foreign country, stipulating for the payment of the freight in gold, on the discharge of the cargo in the United States, could be paid in legal tender notes. A bond and mortgage, with a condition that the same shall be paid in "gold or silver coin," can be discharged and paid by such notes or currency, as it is only a debt. (5 *Wend.* 394. 3 *Conn. Rep.* 58. 3 *Bosw.* 181. 2 *Oranch.* 10. 16 *Iowa Rep.* 244. 10 *Am. Law Reg.* 553.)

The plaintiffs claim that they lent the \$10,000 in gold coin to the defendants, and admit that they took a memorandum for the same, and that fifteen minutes after such delivery they (the plaintiffs) received \$10,000 in legal tender notes, and surrendered up the memorandum; we say, as matter of law, the loaning of said \$10,000 coin created a debt only as between the parties, and the subsequent reception of \$10,000 of legal tender notes discharged such indebtedness, and has thus deprived the plaintiffs of any cause or right of action. The subsequent promises of Van Vleck, one of the defendants, that he or his firm would adjust and pay the differences on said gold loan, can have no weight in creating an indebtedness as against said firm for the premium on said gold coin, if the debt created by such loan had already been satisfied by the payment or delivery of the legal tender notes to the plaintiffs. (*See Mendlebourn et al. v. The People of the United States, N. Y. Times, Jan. 27, 1867, Sup. Court U. S.; Thompson v. Riggs, same court, May, 1867.*) The case of *Thompson v. Riggs, (supra,)* was to recover a coin deposit. The defendant was discharged upon the payment of an equal amount of treasury notes. A special contract to repay in gold was not proved in the case before the court, although it was assumed that such was the custom when gold deposits were made.

CLERKE, J. The judge, at special term, has found, as a matter of fact, that the plaintiffs loaned to the defendants

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ten thousand dollars in gold ; that the defendants agreed to repay this loan in gold ; and that they have repeatedly since the loan promised to return gold to that amount, but that they have never done so.

Does the act of congress, commonly called the legal tender act, apply to this transaction ?

In *Rodes v. Bronson*, (34 N. Y. Rep. 649,) it was held that an obligation contained in a mortgage, executed the 16th of December, 1851, that the mortgagors would pay \$1400, on the 1st of January, 1857, "in gold or silver coin, lawful money of the United States," may be satisfied in United States legal tender notes ; the grantee of the mortgaged property having tendered to the defendant, on the 10th of January, 1865, in payment of the mortgage, United States treasury notes of an equivalent denomination. When the mortgage in that case was executed, gold and silver constituted the legal currency, and the only legal currency, of the United States ; and it would have been considered a most monstrous and chimerical idea, at that happy period, to suppose that any other material would be substituted in their place by the national legislature. That, indeed, were a calamity deemed so demoralizing, so disorganizing, so fatal to financial and commercial stability, that the most desponding or despairing would not venture to predict it. But this calamity has fallen upon us ; and while gold and silver then alone constituted the currency of the United States, treasury notes now alone constitute it, and alone constituted it, when the tender was made in the case of *Rodes v. Bronson*. The obligation in that case was, in fact, to pay "in lawful money of the United States," the words "in gold or silver coin" being deemed mere surplusage. The gist of the promise was, that the debt should be satisfied with whatever might be lawful money of the United States at the time it should become payable. By the acts of congress, passed on the 25th February and 11th July, 1862, United States treasury notes were, in effect, declared to be the only lawful currency of the

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nation ; they were, as I have said, substituted as such, for what had ever been before, since the adoption of the federal constitution, regarded as the only lawful currency. The provisions of these acts, making treasury notes lawful money, and legal tender in payment of debts, have been solemnly pronounced by the highest court of appellate jurisdiction in this state valid, and in all respects in perfect accord and harmony with the federal constitution. Never before had it been disputed that the obligations of a debtor to his creditor were inviolable, except when the former took shelter under laws regulating bankruptcy or insolvency. The constitution itself, in the section containing the restrictions and prohibitions upon the authority of the states, plainly shows that those obligations were so regarded by its framers ; but these acts compel creditors, who were thus entitled to payment in gold and silver coin, to accept, in lieu thereof, paper promises at some indefinite time in the distant future. It may, therefore, be contended with some semblance of plausibility, that the effect of this was nothing more or less than confiscation ; confiscation of one half, one third, or the one fourth of vested rights, or whatever proportion it might be, according to the varying value of the paper promises at the time of payment. That high tribunal, however, has decreed that the acts authorizing these wholesale confiscations are necessary and proper for carrying into execution some of the enumerated powers delegated by the states to congress, such as the power to borrow money and to regulate commerce. I am uncertain whether a very startling proposition, urged (dare we say *argued* ?) with recondite zeal by one of the counsel of the successful party, has been adopted or repudiated by the court ; namely, that the issuing of promises to pay money at an indefinite period, engraved on small pieces of colored paper, is the exercise of the power to " coin money " under the constitution. (*See art. 1, § 8, sub. 5.*) That is to say, a promise to pay money (which refers to the future) is the coining of money (which refers and appertains to the present.)

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Although the question has not been settled by the Supreme Court of the United States, we are of course bound to follow these decisions, in whatever degree they may shock our well-matured and long cherished convictions. None of them, however, in my opinion, affect the case before us. Paper promises having been substituted as the national currency in the place of gold and silver, the latter have disappeared as currency; they no longer possess the functions of national instruments of exchange; and they have become, whatever may be their form, whether in bullion or in coin, merely articles of commerce, having the same characteristics, and being liable to the same legal disposition as other articles of commerce, when they are the subject matter of a contract. Therefore, since the passage of the acts of 1862, when a person promises, for any valid consideration, to return gold or silver, instead of the national currency, he is bound to return those specific things, precisely as he would be bound to return a specific quantity and quality of cotton, if he had promised to do so for a valid consideration. There can be no possible difference; the fact that the one commodity at a former time constituted the legal currency, is no reason why it should be regarded in a different light from other commodities when it is no longer recognized or employed in that capacity. No one would hesitate, for a moment, to declare what the obligations of the defendants were, if instead of gold they borrowed cotton, and promised to return the same commodity of equal quantity and quality; and I presume there would be as little hesitation, if, in the present case, instead of indicating the quantity and quality of the gold lent and the gold to be returned, by employing the word "dollars," they mentioned gold of a specific weight to indicate the quantity; and of a certain proportion of alloy, or number of carat grains, to indicate the quality, or that it should be what, in the trade, is called jewelers' gold, or mosaic gold. But, surely, the employment of the word "dollars" can make no difference in the face of the manifest intent of the contracting parties. The word was obviously

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employed merely for the purpose of signifying the quantity and the quality of the article lent and to be returned. At the time of the transaction, it was notorious that the word dollar in paper, was a very different thing from what it was in gold ; and we all know, by sad daily experience, that the difference soon greatly increased, and that it is great even now. Thus the defendants promised to do something different from paying an ordinary debt ; they promised to return to the plaintiffs gold of the same quantity and quality as that which they received from them ; and the character of the promise is, in no respect, altered by their employment of the word "dollars," to designate the quantity and quality, instead of stating the specified weight, and specified proportions of alloy, or specified carat grain ; as they would have done, if the gold borrowed was in the form of bullion instead of coin. The plaintiffs, therefore, are entitled to damages for breach of this contract, unless they have expressly, or impliedly, released the defendants from its obligation.

II. Have the plaintiffs done this ?

The judge holds, as a matter of fact, that on the 9th of December, 1863, the defendants directed the plaintiffs to write up the bank book, with a view to close their account, having previously found that on the 1st of September, a few minutes after the loan of the gold to the defendants, they delivered to the plaintiffs their check for \$10,000 ; that the plaintiffs received the money for said check in legal tender notes ; that the check was credited to the defendants in the general account which they kept with the bank, and on closing this account a balance of about \$700 was found to be due to the defendants, which the plaintiffs paid. He finds, also, that the accounts so settled were made up exclusively of the defendants' deposits on one side, and the drafts against these deposits on the other, and did not include any charge of gold or premium as sold to the defendants. The check of \$10,000 was received as a deposit, like any other deposit, and, as we have seen, was credited, like any other, to the defendants.

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He also finds, that after the payment of the balance due to the defendants on the bank account, the cashier demanded the return of the gold, and the defendants promised to return it, and that the plaintiffs did not intend, by receiving the check for \$10,000, to satisfy or discharge the defendants' obligation under the contract, by which the gold was borrowed.

Consequently, there was no release, and if I am right in concluding that the defendants are bound by the contract to return \$10,000 in gold, the judgment should be reversed, and a new trial ordered, costs to abide the event.

LEONARD, P. J. concurred.

WELLES, J. dissented.

New trial granted.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clerks and Welles, Justices.*]

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A party has no vested right in the penalties inflicted by the revenue laws for the omission of another to place the proper revenue stamp upon an instrument, which cannot be taken away by an amendment of the act imposing such penalties.

The use of an instrument in evidence when not properly stamped, is forbidden by the government, as an act of policy, for the more safe and speedy collection of the duty, and not for the purpose of benefiting the one party or the other to the obligation. The power to alter or regulate this policy belongs to the government.

The right of a party claiming property as assignee thereof, in trust for the benefit of creditors, to set up the invalidity of a prior mortgage upon such property, by reason of its lacking the proper revenue stamp, may be taken away by a subsequent amendment of the act of congress imposing the penalties for omitting the appropriate stamps; notwithstanding the mortgage was executed before the amendment went into operation.

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A new trial may be granted on the ground of *inadvertence* and *surprise*, at the trial, where the plaintiff shows that he had believed the instrument under which he claimed was an *agreement*, and was surprised by the ruling of the judge that it was a *mortgage*, requiring a different revenue stamp from that affixed thereto, and he was not then prepared to meet the objection.

A PPEAL by the defendant from an order made at a special term, granting a new trial. The facts appear in the opinion of the court.

Nelson Smith, for the appellant.

John S. Woodward, for the respondent.

By the Court, LEONARD, P. J. This appeal is from an order granting a new trial, upon an affidavit showing inadvertence and surprise at the trial.

The action was brought to establish a lien in favor of the plaintiff, upon the proceeds of personal property in the hands of the defendant, as a general assignee for the benefit of creditors, upon the ground that such property had been previously mortgaged by the assignor, Plats, to the said plaintiff.

The defendant Stone, as well as the said Plats, who was made a party defendant to the action, but has since died, answered, denying the allegations of the complaint, and interposing the defense of usury. At the trial the mortgage was produced by the plaintiff, bearing date March 14, 1865, and having a five cent revenue stamp, only, affixed. The defendant objected that it was not properly stamped as required by the internal revenue act of the United States. The court sustained the objection, holding the mortgage void on that ground, and dismissed the complaint. The trial occurred in December, 1865. The revenue laws in force March 14, 1865, at the time the mortgage was executed, provided that offenders, *with intent to evade the provisions of the act*, should forfeit a penalty, and the instrument should be deemed invalid and of no effect. (§ 158, act of June 30,

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1864.) And by section 163 of the same act, any instrument, required to be stamped, was forbidden to be used in evidence in any court, until a legal stamp or stamps should be affixed. The act of congress passed March 3, 1865, had been enacted before the execution of this mortgage, but did not go into operation until April, 1865.

The former act was amended so as to authorize the revenue collector of the proper district, on the application of any party having an interest therein, upon the payment of the price of a proper stamp, and a penalty of \$50, to affix the proper stamp, and note the date and payment on the margin, and the act provided that such instrument should then be held valid as if stamped when made. The collector was also authorized to remit the penalty, where the omission of the proper stamp occurred without any willful design to evade the stamp duty, or delay its payment. All inconsistent provisions of the former act were repealed.

The same section was further amended by act of congress, July 13, 1866, (*ch.* 184, § 9,) but the only material alteration, necessary to be mentioned, is that the instrument when the proper stamp has been affixed by the collector, may be used in all courts and places with the same effect as if originally stamped. The previous amendment of April, 1865, was fully re-enacted by the law of 1866, just referred to.

The plaintiff made affidavit that he had believed the instrument to be an agreement, and was surprised at the trial by the ruling that it was a mortgage, requiring a different revenue stamp, and he was not then prepared to meet it. It also appeared that a revenue stamp for the proper amount had been affixed December 15, 1866, by the collector, with his certificate that it was made to appear by satisfactory evidence that it was originally omitted by error and inadvertence. Upon this affidavit, and the case made up for hearing at the general term upon the exceptions taken at the trial, the defendant moved at special term, before the same justice who tried the action, for a new trial. It ap-

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peared from the case that no evidence was produced at the trial on the subject of a fraud upon, or an attempt to evade the revenue laws, and that the complaint was dismissed solely upon the ground that the instrument was not properly stamped.

The defendant's counsel insists that the act of congress, amending the act in force at the time the mortgage was executed, is retrospective, if it be held to affect instruments executed before the amendment went into operation, and that the defendant has a vested right in the property assigned to him, relieved from the lien of the plaintiff's mortgage, by reason of its invalidity arising from the want of the proper revenue stamps.

The defendant is in error in supposing that he has any vested right in the penalties inflicted by the revenue laws. The use of an instrument in evidence when not properly stamped, is forbidden, as an act of policy by the government, for the more safe and speedy collection of the duty, and not for the purpose of benefiting the one party or the other to the obligation. The power to alter or regulate this policy belongs to the government. So far as the original parties are concerned, they are equally in fault in neglecting to affix the proper stamp. Certainly the maker of the mortgage, upon whom the duty of providing the stamp properly rests, can have no moral right to deny the force of his obligation by the penal effect of the revenue laws, when the mortgagee has inadvertently received the mortgage, without any intent to evade the act. The certificate of the revenue collector states that satisfactory evidence that the stamp was inadvertently omitted has been produced before him. The law makes his jurisdiction upon that subject conclusive, and we must take these facts to be true. The defendant Stone is an assignee of the mortgagor, who has parted with no consideration, and occupies no better position than his assignor. I do not intend to imply that his case would be any better in a legal view, if he had paid a full consideration.

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In *Butler v. Palmer*, (1 *Hill*, 324,) Judge Cowen says : "That a repealing statute is such an express enactment as necessarily divests all inchoate rights which have arisen under the statute which it destroys. These rights are but incident to the statute, and fall with it, unless saved by express words in the repealing clause." The right of a judgment creditor to redeem was, in that case, held to have been taken away by the operation of a subsequent statute.

The authorities which show that the defendant had no vested right to have the mortgage permanently forbidden to be used as evidence by the revenue law, beyond the power of congress to repeal or alter it so as to permit it to be used in evidence, are reviewed at considerable length in the case of *Butler v. Palmer*, and the opinion very carefully sets forth the whole subject. The opinion of Judge Brown while a member of the Court of Appeals in the celebrated case of *Curtis v. Leavitt*, (15 *N. Y. Rep.* 152,) involving the right to interpose the defense of usury which had been taken away from corporations by an act of the legislature, after the creation of the obligations which were in controversy, also fully examines the questions raised by the counsel for the defendant in the present case, and conclusively holds against him.

I may also cite the case of *Washburn v. Franklin*, (35 *Barb.* 599,) decided in the first district, after careful examination by Judge INGRAHAM, and also the cases there referred to.

The death of the defendant Plats did not abate this action, as to Stone. The fund is in his hands, and he represents all parties adverse to the claims of the plaintiff. Plats was not a necessary party, as the facts now appear before the court.

The power to vacate the judgment and direct a new trial was within the discretion of the judge at special term, and was properly exercised.

The order should be affirmed, with \$10 costs of the appeal.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clarke and Wallis*, Justices.]

**BURKE vs. THE BROADWAY AND SEVENTH AVENUE RAIL-
ROAD COMPANY.**

An infant, when suing in his own behalf for injuries to his person arising from the negligence of others, must be free from the imputation of negligence on his part tending to produce the damages sought to be recovered. The rule is the same whether the action be by an infant or an adult.

It is no excuse for the want of ordinary prudence by an infant, that he had less discretion than a man. He is required to exercise the prudence of a person of ordinary intelligence, before an action for damages can arise for an injury to his person, resulting from the carelessness of others.

An infant is required to take the same care of himself as any other person. All are held accountable for a reasonable degree of prudence, as to their own safety.

The father of an infant, suing for damages sustained by the latter through the negligence of others, can recover only under the same circumstances of prudence as would be required if the action were in behalf of the infant.

A PPEAL from a judgment rendered at the circuit upon the verdict of a jury in favor of the plaintiff, for \$500, in an action brought to recover damages for loss of service of his minor child, a lad less than six years of age, who was run over by one of the defendants' cars, in Thompson street, in the city of New York, on the 3d of May, 1865, through the alleged negligence of the defendants, their agents or servants, and so badly injured as to require the amputation of his leg. The material facts are stated in the opinions.

When the plaintiff rested, and again, at the close of the case, the defendants' counsel moved to dismiss the complaint upon the grounds: "That the plaintiff has failed to prove a cause of action. That no negligence on the part of the defendants or any of their agents or servants has been shown. That the evidence shows that the boy by his own negligence contributed to the injury. That the plaintiff has failed to show that the accident was occasioned solely by the negligence of the defendants. That the boy was himself in fault, and the plaintiff is not entitled to recover. That a party suing to recover damages for negligence must show himself

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free from fault. That the plaintiff, as parent, is chargeable with negligence in allowing a child of such tender years to go to play in the public street in the city of New York without a guardian or protector."

The motion was denied by the court, and the defendants' counsel duly excepted.

Mr. Scribner, for the appellant.

L. K. Miller, for the respondent.

LEONARD, P. J. An infant, when suing in his own behalf for injuries to his person arising from the negligence of others, must be free from the imputation of negligence on his part tending to produce the damages sought to be recovered. The rule is the same, whether the action be by an infant or an adult. We would not hesitate to hold an adult person, who should rush from the sidewalk, when a street rail car was passing near, (within four feet of the curb stone, where the proper allowance is made for the projection of the car body beyond the railroad track,) and lying down upon a heap of sand, placed in the narrow space between the track and the curb stone, seeking to recover an article which had fallen from his hand upon such narrow space, to be guilty of inexcusable negligence.

In reckless and childish haste the infant approached so near the car as to bump his head against it. It is no excuse that he did not see the car. It appears to be negligence not to have done so. Ordinary prudence would have prevented. Nor is it any excuse that the lad had less discretion than a man. He is required to exercise the prudence of a person of ordinary intelligence, before an action for damages arises for an injury to his person resulting partly from the carelessness of others. The lad was required to take the same care of himself as any other person. All are held accountable for a reasonable degree of prudence as to their

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own safety. That reasonable care is the same, whether the rule be applied to a simpleton or a wise man. An injury received without reasonable prudence, on the part of the person injured, gives no right to recover amends in pecuniary damages. The father can recover only under the same circumstances of prudence as would be required if the action were on behalf of the boy.

The negligence of the driver was, it is clear, a question for the jury, and it was properly submitted.

The motion to dismiss the complaint should have been sustained upon the other ground. The call of Mrs. Webber was a warning to the child as well as to the driver of the car. It is difficult to understand from the evidence that the driver could have managed the car so as to have prevented the accident; but I lay no weight upon this question, and am of opinion, under the decision in the case of *Ernst v. The Hudson River Railroad Company*, (32 How. Pr. 61, 88,) that the case on this point should have been left to the jury, had it not been beyond doubt that the negligence of the boy contributed to produce the injury.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CLERKE, J. concurred.

MILLER, J. (dissenting.) The principle of law is well settled that to recover damages in an action for injuries occasioned by the negligence of a party, it must be made to appear that the defendant was guilty of negligence, and that there was no negligence on the part of the plaintiff which co-operated with the misconduct of the defendant to produce the injury complained of. (*Button v. Hudson River R. R. Co.*, 18 N. Y. Rep. 248. *Deyo v. N. Y. Central R. R. Co.*, 34 id. 9. *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 4 Comst. 349. *Wilds v. Hudson River R. R. Co.*, 24 N. Y. Rep. 430.)

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Where the evidence is conflicting, as to negligence, the case should be submitted to the consideration of the jury. (*Drew v. Sixth Avenue R. R. Co.*, 26 N. Y. Rep. 49. *Ernst v. Hudson River R. R. Co.*, 32 How. Pr. 61, 88.)

As to the negligence of the defendants in this case, which is the first question to be examined, I think the testimony was contradictory, and not sufficiently preponderating in favor of the defendants to take the case from the jury. Three of the plaintiff's witnesses testified that the car came along very fast. Two of them agree that one of these witnesses halloed to the driver to stop, and that he proceeded without heeding the warning. The conductor and driver both contradict the principal facts sworn to by the plaintiff's witnesses, and there is considerable contrariety in the whole evidence, as to some other important facts in controversy, in reference to this branch of the case. There is not, however, such a strong preponderance in favor of the defendant as to authorize the court to say that the weight of the evidence was entirely against the plaintiff; and I think it was a fair case to submit to the consideration of the jury upon the question of the defendants' negligence.

The question arising as to the negligence of the boy is more troublesome and difficult, but I am inclined to think was properly submitted to the jury. If we assume as the plaintiff, in this cause, stands in the same position that the infant would, were he a party to this action, which, perhaps, is the correct rule, then he must be held to that degree of care which a person of ordinary prudence would exercise, without regard to his tender years. (*Honigsberger v. The 2d Av. R. R. Co.*, *Manuscript Opinion of Court of Appeals.*) The fact that he is an infant, would not help him, of itself, and does not confer any right to occupy the highway differently, or in any other manner, than a person of full age and mature understanding. Nor do I understand that the mere fact that his parents suffered him to go at large, alone and of itself, establishes negligence. *Hartfield v. Roper*, (21 Wend.

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615,) was a case where the infant was only two years of age, and was permitted to go at large on a public highway, and it was held that the want of care on the part of the parents, or guardian of the child, furnished the same answer to the action as would its omission on the part of the plaintiff in an action by an adult. This rule was held to be applicable, considering the immature years of the child, and the place where the injury was done, and the surrounding circumstances of the case. It cannot, however, be invoked in a case like the one now considered. In *Drew v. The 6th Av. R. R. Co.*, (26 N. Y. Rep. 49,) the defendants were held liable in the case of a boy eight years of age, and it was decided that it was not, as a matter of law, negligence on the part of the parent to send him to school without a protector. (See also *Konigsberger v. The 2d Av. R. R. Co.*, before cited.) Assuming, then, as, I think, may be done, in view of all the authorities, that the fact of the child being alone was not *per se* negligence, we are brought to a consideration of the question whether the acts of the boy were negligent and contributed to the injury. The testimony shows that he was about six years of age, and was in the street alone, and unattended, playing at or near a dirt heap, between the sidewalk and the railroad track. He had a wheel or something in his hand, which fell out of it into the heap of dirt, and he stooped to pick it up. The car was coming quite rapidly, and the car ran over him. One witness, Mrs. Webber, swears that she saw the child stoop. She halloed, and said stop, and thought that the driver could have stopped before he got to the child, if he had a mind to. She states that the horses were trotting very hard—a good deal faster than the cars generally go on that street.

Ella Clayton testified, substantially, to the same facts. The boy, who was allowed to make a statement, not under oath, states that he was on the sidewalk when he dropped the wheel. It rolled to the heap of dirt, and he ran after it quick. He did not see nor hear the car. He was lying on

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the heap of dirt looking over to get the wheel, and tried to pull his leg out, but could not.

The evidence of the plaintiff is contradicted in its material particulars by the defendants' testimony. The car driver testifies, that the boy ran out to catch hold of the car, and the driver warned him off. The boy Gillhooley, who was also allowed to make a statement, not under oath, says that the boy Burke was running along, and had hold of the side of the car about in the middle. There is also testimony of the conductor and the driver, that the car was running at a moderate rate of speed, and contradictions on the most important points of the plaintiff's evidence. It is difficult to determine where the preponderance was, and the jury, who heard the witnesses, were better qualified to decide that matter than this court.

The real point after all is, that taking into consideration the situation of the boy as described by the witnesses, does it show negligence on his part ?

In *Bernhardt v. The Rensselaer and Saratoga R. R. Co.*, (23 How. Pr. 168,) Selden, J. in discussing the question as to the submission of a question of negligence to a jury, says : "If there are inferences to be drawn from the proof which are not *certain* and *incontrovertible*, they are for the jury. If it is necessary to determine, as in most cases it is, what a man of *ordinary care and prudence would be likely to do under the circumstances proved, this involving, as it generally must, more or less conjecture, can only be settled by a jury.*" (See also *Ireland v. The Oswego Railroad Company*, 13 N. Y. Rep. 536 ; *Keller v. The New York Central Railroad Company*, 24 *id.* 177.) I think it may be said, that inferences to be drawn from the facts to be presented, are by no means so sure as to leave no question in regard to them. Nor can it be doubted that it was necessary to determine, in this case, what ordinary care and prudence required, within the principle laid down by Judge Selden.

If, as has been supposed, the Court of Appeals has varied

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in any respect from the sound and salutary rule here laid down, in the recent case of *Ernst v. The H. R. R. Co.*, (32 *How. Pr.* 61,) the authorities are fully reviewed in an elaborate opinion by Porter, J. sustaining the views expressed by Judge Selden, and holding strongly in favor of submitting questions of fact to a jury, in cases like the present. The learned judge says: "The question, whether the plaintiff was free from negligence, in ordinary cases of this description, is one of fact, to be determined by the jury under appropriate instructions, and subject to the revisory power of the courts. Occasional instances occur where the proof of misconduct is so clear and decisive, that the judges are bound to pass on the question of negligence, as matter of law. It is a mistake, however, to suppose that the decisions made from time to time in these two classes of cases, conflict with each other, or involve any departure from the settled rules of law. When the question arises on a state of facts on which fair minded men may rationally arrive at *opposite conclusions, the issue is properly submitted to a jury.*" Again, he says: "Even among the cases which have been held so plain as to justify a nonsuit, there have been few in which the judges have not themselves disagreed, and the inquiry naturally occurs to the mind whether we are less liable than jurors to err on questions of mere fact pertaining to the ordinary affairs of life. Our law is framed upon the theory that on such questions the citizen can rely, with more security, on the concurrent judgment of twelve jurors than the majority of a divided bench. Unanimity is not required in our decision on questions of law. It is otherwise with jurors charged with determining issues of fact, and such issues should not be withheld from the usual arbiters, unless the evidence leads so clearly to one result, and there is no reason for honest difference between intelligent and upright men. A nonsuit should always be granted when the proof is so clear as to warrant the assumption, in good faith, that if the questions were submitted to the jury, *they*

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would find the culpable negligence of the plaintiff contributed to the injury."

These views are founded in practical wisdom and experience, and the history of the law and trials of this character evince that, in most cases, juries are apt to be right, even although they sometimes differ from the courts as to the conclusions to be drawn from the evidence presented. When they clearly err, the court should not hesitate to interfere and rectify the mistake. But, as a general rule, the judgment of an intelligent and unbiased jury, acting under the solemn sanction of an oath and the instructions of an enlightened judge, is the safest depository of the rights of parties in all questions of fact which may arise.

It follows, from the remarks made, that no error was committed by the judge on the trial, by refusing to dismiss the complaint, and in submitting the question arising as to the negligence of the defendant and the plaintiff to the jury.

I have examined the other questions raised, and think there was no error in the ruling of the judge in regard to them. The judgment should be affirmed, with costs of appeal.

New trial granted.

[NEW YORK GENERAL TERM, June 3, 1867. *Leonard, Clarke and Miller, Justices.*]

RENTON vs. KELLY, Sheriff, &c.

Provisions in an assignment for the benefit of creditors, directing the assignee to continue and carry on a business for the period of eighteen months, at his discretion; to sell and dispose of the assigned property, and such other articles as he may manufacture, *on credit*, or otherwise; to use the proceeds in continuing the business; to employ the assignor in the business during the continuance of the trust, at a specified salary; leaving it in the discretion of the assignor to say when the trust shall be closed; and providing for the release of the assignor, and excluding from the benefit of the trust creditors who shall object to the trust deed; are contrary to law, and render such deed fraudulent and void as against the creditors of the assignor.

Renton v. Kelly.

THIS action was brought by George H. Renton, as trustee for the benefit of the creditors of Andrew Campbell, against John Kelly, sheriff of the county of New York, to recover eight thousand dollars damages, being the value of certain machinery, tools, &c. wrongfully levied upon and sold by the defendant under an execution against the property of said Campbell, in favor of the Elizabethport Manufacturing Company. Andrew Campbell was a maker of printing presses, at the corner of Pearl and Elm street, New York, and there owned stock, machinery, tools, fixtures, &c. &c. necessary for such business. In 1859 he became much embarrassed, and John J. Merritt loaned and advanced him in cash, \$20,000, or thereabouts. To secure these advances, Campbell executed to Merritt a chattel mortgage for \$18,896, payable on demand, on his said machinery, tools, and office furniture, being a portion of his property at the corner of Pearl and Elm streets. This mortgage was dated and acknowledged April 4th, 1860, and filed April 5th, 1860, in the register's office, King's county; Campbell then residing at Brooklyn. On the 4th May, 1860, Merritt demanded payment of the money secured by the mortgage. Campbell did not pay; whereupon Merritt at once took possession of the mortgaged property under the mortgage, and kept possession, and, under an agreement between him (Merritt) and Campbell, dated 5th May, 1860, carried on the business in his (Merritt's) name until the 24th May, 1860, when he (Merritt) delivered the said property to the plaintiff, (Renton,) who took and retained exclusive possession until divested by the defendant. On the 24th May, 1860, Merritt, Campbell, and the plaintiff, (Renton,) made articles of agreement tripartite, whereby Merritt and Campbell conveyed their interest in certain other property they had at the corner of Pearl and Elm streets to the plaintiff in trust, upon certain terms and conditions therein named, subject to the liens by way of mortgage, held by Merritt. This agreement also contained full directions as to the management and disposition of the property in question in this suit, (viz. the

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machinery, tools, office furniture, &c. in daily use in the business,) and for the disposition of the proceeds of the same, this property having been delivered as aforesaid by the owner, Merritt, to the plaintiff the same day, 24th May, 1860. The trusts of this deed were as follows: To take possession, *subject to the mortgage* liens, collect the moneys owing and choses in action, and apply them, in the trustee's discretion, to finish up work in process of manufacture, and to continue and carry on the business for a period not to exceed eighteen months, underlet room and power, employ workmen, furnish materials, sell on credit or otherwise, and apply the property which was not subject to mortgage in continuing and carrying on the business, and to the payment of debts in a certain order, and from time to time divide among the creditors in the ratio of two thirds to Merritt and one third to all the other creditors, until the indebtedness was fully paid, allowing for this a period of eighteen months. Then follows a *proviso*, that at the end, or earlier closing of the business, he should dispose of the property at public or private sale, *on credit*, or otherwise, and make dividends among such of the creditors as shall not have been paid. Certain collaterals which Merritt held for his indebtedness are mentioned in schedule D. which he was to retain and apply to his indebtedness as realized; the dividends to be made by the trustee to Merritt on the full amount of his indebtedness without any other deduction than such sum as he should at the time of the dividend have received from the collaterals. Next follows a provision that the trustee should employ Campbell, during the trust, at a salary of \$2000 per annum, and all expenses were to be paid by the trustee, including Campbell's bills to the lawyers. Merritt and Campbell could require the trust to be closed before the expiration of the eighteen months, when Campbell could be allowed to resume the business in his own name and on his own account and behalf, with the property then remaining in the hands of the trustee, on terms to be agreed upon between them, having in view the interest of Campbell's

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creditors, when the trust should cease. All the creditors of Campbell who should consent to take a dividend under the trust should be deemed to accept the provisions of the agreement in full of their claims, and release Campbell therefrom, and any creditor who should not signify in writing his assent to the agreement, should, at the option of the parties to it, be excluded from its benefits. After the trust was fulfilled, the property remaining was to be reassigned and returned to Campbell.

Renton, the plaintiff, having taken possession of the property under this trust, Campbell continued to work as provided in the agreement, and continued in possession of it subject to the lien of Merritt's mortgage, (which remained unimpaired, and could be enforced at any time he saw fit to enforce his lien,) and proceeded to use the property in conjunction with Campbell.

On the 3d September, 1861, the defendant levied upon and subsequently sold the property in question in this suit, under an execution upon a judgment for \$2,328.27, in the suit of the Elizabethport Manufacturing Company against said Campbell; whereupon this suit was brought.

At the close of the case, the defendant's counsel moved to dismiss the complaint, on the ground that Mr. Renton, the plaintiff, as against the sheriff, had no title to this property.

The court held that the plaintiff had not shown any title to the property in question; that no such delivery of the property to the plaintiff by Mr. Merritt as was necessary to pass the title had been shown; that the deed of 24th of May, 1860, did not convey to the plaintiff any interest in or title to the property; that the evidence established that on the 24th of May, 1860, the title to the property covered by the mortgage had become absolute in Merritt, the mortgagee, who was then in possession thereof, but that no transfer or delivery of the property, or of the possession of the same from Merritt to the plaintiff, had been proven; that the assign-

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ment under which the plaintiff claimed title to the property was void, as against the sheriff, acting under his process.

The motion was granted by the court, and the plaintiff's counsel excepted.

From the judgment of dismissal the plaintiff appealed.

Joseph W. Howe, for the appellant.

A. J. Vanderpoel, for the respondent.

By the Court, LEONARD, P. J. The judge was right at the circuit, I think, in holding that the plaintiff had no valid title to the property in question, as against a judgment creditor of Campbell.

The plaintiff, by his complaint, claims title as trustee for the benefit of the creditors of Andrew Campbell. The only evidence of title is derived from the written instrument of May 24, 1860, between Merritt of the first part, Campbell of the second part, and Renton, the plaintiff, of the third part. The interests of Merritt and Campbell can be there ascertained, as they claim them to have existed; and that claim is affirmed by the plaintiff as a party thereto, and also by his introduction of the instrument in evidence. By the recitals thereof Merritt claims to own only the property mentioned in schedule A and to have *liens by way of mortgage* on other personal property of Campbell. The property mentioned in schedule A consisted of presses, and is not affected by this action; while that covered by the mortgage liens embraces the subject of this controversy. By the first article of the instrument Merritt relinquishes and quit-claims to Renton all the property embraced under the liens of the mortgages, "except such as are mentioned in schedule B." That schedule appears to contain many similar articles to those mentioned in the schedule attached to the answer—the complaint describes the property only in a very general manner. Their identity appears not to be in dispute.

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The instrument, so far as Merritt is a party, states no title in him to the machinery, tools, &c. (which are the subject of the controversy) except that of mortgagee. He relinquishes his lien, except as to a particular part, mentioned in schedule B, as to which he retains the lien of a mortgagee. The same right and title of mortgagee is again recognized by Campbell in the second article, and the property there is declared to be subject to the liens of the said mortgages, except so far as it has been released. It appears to be entirely clear that the title of Merritt, as recognized and declared by the said instrument, was that of a mortgagee only, notwithstanding the technical title of owner which had accrued by his demand of payment, and taking possession of the mortgaged property upon the neglect or refusal of Campbell, the mortgagor, to make payment on demand, according to the terms of the mortgage. Merritt must therefore, by the admission of the parties to that instrument, be regarded as having only the title of a mortgagee, and was not, of course, capable of creating any trust in respect to the title of the property in question. It may be observed, also, that no actual change of the possession of the property appears to have taken place, at any time.

The legal title, subject to the lien of the mortgages to Merritt, was in Campbell at the time of the execution of the said instrument, and the trusts therein mentioned must be regarded as having been created or granted by him. There was no occasion for Campbell to be united as a party to the instrument, except for the purpose of conveying to the plaintiff Renton, the legal title to the property, and vesting in him the trusts therein contained for the benefit of creditors, with a resulting interest in himself upon their payment.

The provisions of the trust are clearly void as against the creditors of Campbell. The learned counsel for the plaintiff has not attempted to vindicate them, but places the right of Renton to recover upon a title supposed to be derived from Merritt as the owner of the property at the time

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the said instrument was executed. The fallacy of his claim is fully shown by the said instrument, which he produced in evidence as the foundation of his title. There is no other evidence tending in the smallest degree to give any title to Renton, the plaintiff, as trustee for the benefit of the creditors of Campbell, in conformity with the allegations of the complaint. As that instrument shows the title to the property in question to have proceeded from the debtor, Campbell, and the trusts thereby created, to be contrary to law, and fraudulent as to his creditors, the plaintiff has no cause of action to recover its value.

The judgment must be affirmed, with costs.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Geo. G. Barnard and Clarke, Justices.*]

SCHEPP vs. CARPENTER.

Where an accommodation note not restricted as to the mode of its use, by the lender, has been transferred to pay or secure a precedent debt, the holder may recover, because the note has answered the purpose for which it was created, and the maker is to be considered as consenting to any use which operates to the benefit of the borrower.

The rule is otherwise where the note has been obtained by fraud; or was given for a specific purpose; or is void in the hands of the payee on grounds of public policy, or otherwise. In such a case a precedent debt is not a consideration for a transfer of the note, which will entitle the holder to recover.

THIS was an action upon a note dated February 20, 1865, made by the defendant, payable to Henry Church, or order, three months after date, for \$300, and indorsed by Church, and delivered to the plaintiff. The defendant in his answer does not deny the note, but avers that the note was an accommodation note, loaned to Church. Upon the trial at the circuit, held by Justice CLERKE in February, 1866, it appeared that the plaintiff, who was a merchant, had

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sold goods to Church to the amount of over \$800 ; that Church was behindhand in his payments ; that the plaintiff had pressed him for payment, and that Church had indorsed and delivered him this note on account of his indebtedness. That before the plaintiff gave Church credit for the note, he sent to the defendant to know if it was right, and was told by the defendant that it was all right, and would be paid. The only defense pretended was that the note was lent to Church to help him in his business. The defendant so testified. The court charged the jury, that if the plaintiff took the note in payment of a debt due from Church, or as security for such payment, they would find for the plaintiff the amount of the note and interest.

The defendant's counsel requested the court to charge the jury as follows :

1st. That if the defendant received the note without parting with any money or property after its receipt, or upon the promise of receiving the same, or giving the defendant credit on account of his indebtedness, the plaintiff cannot recover against the defendant, if the note was without consideration, as between Church and the defendant, and was only a borrowed note.

2d. That the plaintiff, if he paid no money or goods for the note, or gave up none of his rights against Church for the same, cannot recover against the defendant, any more than Mr. Church could, if he had sued the note.

3d. That if the plaintiff was not a holder for value, it being accommodation paper, he cannot recover, and the jury should find for the defendant.

4th. The note must have been received in payment or satisfaction, before he is a *bona fide* holder for value.

5th. That if they believed the testimony of Church, that the note, if paid, was to be credited on account of his indebtedness, and if not paid, it was to be returned to him, then the plaintiff was not entitled to recover, and he was not a holder for value.

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The judge refused so to charge, except as he had already charged. To each and every of which aforesaid refusals to charge as requested, the defendant's counsel excepted.

The jury, under the charge of the said justice, brought in a verdict for the plaintiff, for \$315.15; to set aside which verdict, a case and exceptions were made, and the defendant appealed from the judgment.

John E. Parsons, for the appellant. I. The plaintiff gave no time, nor in any way parted with any thing, for the note. The most that can be claimed is, that he took it as security for his debt. That, of course, would not constitute him a holder for value. (*Coddington v. Bay*, 20 John. 636. *Stalker v. McDonald*, 6 Hill, 93. *Farrington v. Frankfort Bank*, 24 Barb. 554. *Traders' Bank of Rochester v. Bradner*, 43 id. 392.)

II. The court in effect instructed the jury that it was not necessary to the plaintiff's success that he should be a holder for value. The defendant does not deny that a holder of accommodation paper, who takes it after maturity, (*Corbitt v. Miller*, 43 Barb. 305;) or with notice, (*Grant v. Ellicott*, 7 Wend. 227;) may maintain an action upon it; but respectfully insists that he cannot do so, unless he is a holder for value. 1. In England, it is the settled rule, that the holder can only recover to the extent of the value he has paid. (*Jones v. Hibbert*, 2 Starkie, 304. *Chitty on Bills*, 80, and cases cited.) 2. And in a recent case, stronger for the plaintiff than this, where an accommodation note was made for the very purpose of being transferred by the party at whose request it was made, as security for his antecedent debt, it was held that there could be no recovery, the plaintiff having paid no value. (*Crofts v. Beale*, 20 Law Jour. N. S. 186. *Id.* 15 Jur. 709.)

III. The case of *Seneca County Bank v. Neass*, (3 Comst. 442,) may be supposed to favor a different view; but an examination of that case will show that there the note was

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applied in payment of another note. *Grandin v. LeRoy*, (2 Paige, 509,) was a motion to dissolve an injunction on pleadings; and it is not clear that the note was not received by the holder in payment. That case proceeded on the authority of *Bank of Rutland v. Buck*, (5 Wend. 66,) in which Savage, Ch. J. says, the note *passed to the credit* with the holders, of the parties for whose accommodation it was made, and that "the case of *Marvin v. McCullum*, (20 John. 288,) and *Chenango Bank v. Hyde*, (4 Cowen, 567,) are authorities showing the right of the plaintiff to recover." In the latter case the holder paid full value for the note; and the former has nothing to do with the question.

IV. No other case, it is believed, can be found giving any color to the plaintiff's claim, which is in violation of the general principle requiring a consideration, equally applicable to choses in action as to other contracts. A chose in action presumes a consideration, but that presumption can be and here is rebutted. The Superior Court, in a very recent case, has decided the point in question in the defendant's favor, (*Duncan v. Gosche*, 21 How. Pr. 353;) and in recent cases, in other states, similar decisions have been made. (*Trustees, &c. v. Hill*, 12 Iowa R. 462. *Williams v. Banks*, 11 Maryland R. 98. *Mackay v. Holland*, 4 Metc. 69.)

Nelson Smith, for the respondent. I. It seems to be well settled that when a note is lent to accommodate the borrower, without any restrictions as to the manner in which it is to be used, it may be used in any legitimate transaction, and the maker will be liable to the holder who has taken it from the borrower in payment or as security for an old debt. (*Bank of Rutland v. Buck*, 5 Wend. 66. *Powell v. Waters*, 17 John. 176. *Smith v. Knox*, 3 Esp. R. 46, per Lord Eldon.) The reasoning of these cases proceeds on the idea, that it is quite as much an accommodation to the borrower of such a note, who is indebted, for his creditor to take it for

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his debt, as it had been if he had first obtained a loan upon it and paid the money over to his creditor. (*Bank of Rutland v. Buck*, 5 Wend. 66.)

II. There is no pretense here, either in the answer or the evidence, that the note was limited or restricted to any particular purpose. It was made to accommodate Church in his business, and used by him with the express consent of the defendant. The ruling of the court was founded, therefore, not only on plain common sense, but was strictly within the doctrine of all the cases.

By the Court, LEONARD, P. J. The judge charged the jury that if they believed the note was received in payment for a debt, or as security for the payment of it, they should find for the plaintiff.

The defendant's counsel requested the court to charge the jury so as to exclude the right to recover on the note if it was taken by the plaintiff as security for a debt. Also that if they believed that the note, if paid, was to be credited on account of the indebtedness of the payee to the plaintiff, and if not paid, it was to be returned to him, then the plaintiff was not entitled to recover, and he was not a holder for value.

The note was loaned by the defendant to the payee, for his accommodation, without any restriction as to the manner in which it might be used.

Where such a note has been transferred to pay or secure a precedent debt, the holder may recover, because the note has answered the purpose for which it was created, and the maker is to be considered as consenting to any use which operates to the benefit of the borrower. The rule is otherwise where the note has been obtained by fraud, or was given; for a specific purpose, or is void in the hands of the payee on grounds of public policy or otherwise. In such a case a precedent debt is not a consideration for a transfer of the note, which will entitle the holder to recover. (*Corbitt v. Miller*, 43 Barb. 309, and the cases there cited.)

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The jury found for the plaintiff, and thereby found that the note was received by the plaintiff in payment or as security for the debt due to him from the payee of the note. They could not have credited the defendant's witness, who testified that the note was to be returned by the plaintiff to the payee, if not paid. This evidence was given by the payee of the note, and was inconsistent with his indorsement, and ought to have been disregarded, on that ground.

The requests of the defendant's counsel were substantially a negative or denial of the proposition contained in the charge of the judge. The charge was correct, and the requests wrong.

I think there was no error, and that the judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clarke and Wallis*, Justices.]

DOWNING vs. KELLY, Sheriff, &c.

A failing debtor has no right to interpose a legal title between his property and his debts, to compel his creditors to take notes, drawn on time, in payment of those debts.

Where a debtor sold his stock of goods to his son and a clerk, taking their notes, without security, for the consideration, payable respectively at different times, from three months to three years from date, with the view of placing his property in such a situation that his creditors could not take it under legal process; and to compel such creditors to take those notes in payment of his debts; *Held* that this was a legal hindering and delaying of creditors, which rendered the transfer in judgment of law void.

APPEAL by the defendant from a judgment entered on the verdict of a jury. The action was brought against the defendant, as sheriff, for the conversion of property. Prior to February 1, 1860, one Samuel Baldwin, who had long carried on the business of jewelry, &c. in the city of New

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York, had owned the property in question. On that day he sold out the stock to his son, W. S. Baldwin, and his clerk, H. G. Batterson, who had been in his employ; they forming a new copartnership under the firm of W. S. Baldwin & Co. taking possession of the stock, and giving their promissory notes for the purchase money, falling due in small sums at short intervals, extending over a period of three years, amounting in the aggregate to \$20,000.

About the first of March, the defendant having an attachment against Samuel Baldwin, (who resided in Newark, and was a non-resident debtor,) in favor of one Schieb, came to the store of W. S. Baldwin & Co. and announced his intention to make a levy upon their stock of goods, as being the property of S. Baldwin, but the levy and asportation were not made for several days thereafter. Prior to this levy, and asportation, W. S. Baldwin & Co. being indebted to the plaintiff, executed on the 6th of March, 1861, a *chattel mortgage* to the plaintiff upon all their stock of goods, authorizing immediate possession in the mortgagee, &c. At the trial, which took place at the March circuit, 1865, before Hon. JOSEPH MULLIN, and a jury, the case wholly turned upon the question of bona fides in the sale from Samuel Baldwin to W. S. Baldwin & Co. which was substantially the only question litigated. W. S. Baldwin had died about two years before the trial.

The verdict was for the plaintiff, sustaining the good faith of the sale in question. Exceptions were taken by the defendant to several rulings of the court, and to certain refusals to charge, which formed the subject of consideration at general term, to which this case was sent in the first instance; judgment being suspended, &c.

Brown, Hall & Vanderpoel, for the appellant.

E. Pierrepont, for the respondent.

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By the Court, GEO. G. BARNARD, J. The defendant was entitled to have his sixth request charged substantially as requested.

An assignment of the property in question had been made by Samuel Baldwin to his son and clerk, and their notes taken for the consideration, without security, and upon credit, maturing between three months and three years. Samuel Baldwin was pressed by his debts, at the time of the sale, and his son had little property, at the time of the purchase, and his clerk, the other joint purchaser, was unable to meet his engagements. The goods consisted of a stock on hand in New York, and the son and clerk formed a new partnership, under the name of William S. Baldwin & Co. to continue the same business, with the old stock. Some of the notes so taken by Samuel Baldwin were given by him to his creditors. Under these facts, as disclosed by the evidence, the defendant asked the court to charge that if Samuel Baldwin made the transfer to William S. Baldwin & Co. and took their notes, payable respectively at different times, from three months to three years from date, with the view of placing his property in such a situation as that his creditors could not take it under legal process, and to compel his creditors to take these notes in payment of his debts, then this transfer in judgment of law was void. The court charged the proposition as requested, provided it was understood by the words, "with a view of placing his property in such situation as that his creditors could not take it under legal process," means to hinder and delay creditors. Of course every conveyance and sale with intent to hinder, delay and defraud creditors is void as provided by the statute; but here the request was that the judge should charge the jury that a finding by them of certain facts would make out a legal hindering and delaying of creditors. Such facts could be found under the evidence. If so found they did make the sale void, and the jury should have been so instructed. A failing debtor has no right to interpose a legal title between his property

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and his debts, to compel his creditors to take notes drawn on time in payment of those debts. I think the judgment should be reversed and a new trial granted, with costs to abide the event.

The conclusion arrived at on this point rendering a new trial necessary, I forbear to consider the question presented by the appeal upon the facts, or the other exceptions taken by the defendant.

[NEW YORK GENERAL TERM, June 8, 1867. *Leonard, Clarke and George G. Barnard*, Justices.]

MCINTOSH vs. LOWN and others.

A covenant, on the part of the lessees, in a lease, "to keep the buildings and fences in good repair, except natural wear and tear," binds them to rebuild in case of accidental destruction by fire or otherwise.

Where a lease contained seven distinct independent covenants, the third of which was to keep the buildings and fences in repair, and the seventh, to build, during the continuance of the lease, 125 rods of fence; *Held*, that a former action by the lessor, upon the last covenant, for not building the fence, was not a bar to an action subsequently brought upon the covenant to repair; the two covenants being distinct, and having no connection with each other, except that they were contained in, and evidenced by, the same instrument. The former action must have been to recover for the same identical cause of action, or for some part thereof, as the plaintiff seeks to recover in the second, in order to be a bar.

The rule upon this subject, laid down in *Phillips v. Berick*, (16 John. 140,) approved.

APPEAL from a judgment dismissing the complaint, directed at the trial before a justice of this court, without a jury. The plaintiff alleged, in his complaint, that on or about the 17th day of November, 1857, by an instrument in writing dated that day, duly executed by the said plaintiff, and the defendants, under each of their respective hands and seals, he, the plaintiff, duly leased to them, and they, the

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defendants, duly hired and rented of him certain of said plaintiff's premises and lands, situated, &c. for and during the term of five years from the 1st day of April, 1858; and in pursuance of the said lease they, the defendants, on or about the 1st of April, 1858, did take possession of said premises and of the buildings thereon, and did occupy and hold the same during the term aforesaid of five years, and which duly expired on the 1st day of April, 1863. That in and by the said instrument, or lease, the defendants jointly and severally covenanted with the plaintiff, that they, the said defendants, would keep the buildings and fences situated on said premises in good repair, except the natural wear and tear thereof. That at the time of the said letting, and when the defendants so took the possession and occupancy of the said premises, there was a good and substantial barn thereon, of which, with the rest, the defendants took the possession and occupancy under the said lease; and thereupon, under the said covenant, it became and was the duty of said defendants to uphold and keep in good repair the said barn. That, nevertheless, the defendants, disregarding their said duty and covenant, did not keep the same in good repair, but suffered the said barn to be altogether destroyed in the summer of the year 1861, and neglected to uphold, restore and repair the same, and have ever since neglected to repair or restore the same, to the damage of the plaintiff of \$500, for which sum, with interest and costs, judgment was demanded.

The defendants, by their answer, admitted the execution of the lease, by the parties, but averred that it contained other covenants and conditions than those set forth in the complaint, viz. that the parties of the second part (these defendants) therein covenanted and agreed "to build during the said term of five years, the quantity of 125 rods of post and board fence, four boards high, on said premises." And the defendants allege, that having failed on their part to build said 125 rods of fence, the plaintiff, on or about the 24th day of July, 1865, commenced a suit against the defendants

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before E. H. Whitney, a justice of the peace, of Cayuga county, and issue was duly joined therein on the first day of August, 1865, and the plaintiff therein, on the first day of August, 1865, complained on the same identical indentures of lease or contract, upon which this action is brought, for the alleged breach by the defendants of a covenant and agreement in said lease, on the part of the defendants to be performed and done, and that they had neglected and refused to build 125 rods of board fence as described in said lease, and as required by the terms thereof, for which neglect and omission and breach of said agreement, the plaintiff demanded judgment for \$100 damages. That the defendants denied each allegation in said complaint in their answer, and the said cause was adjourned to August 15, 1865, at which time it was duly tried before the said justice of the peace, and a jury, and the plaintiff recovered a judgment on said trial against the defendants for the cause aforesaid, for the sum of \$36 damages, besides costs, which was duly entered by the said justice on that day, and remains unreversed, a good and valid judgment, for the cause aforesaid, against these defendants. That this action was commenced after the said judgment was rendered, and about the 25th day of September, 1865; and that the pretended cause of action and breaches of contract, covenant and conditions upon which the plaintiff complains in this action had accrued to the plaintiff before the commencement of said action before the said justice of the peace; and the defendants insisted that said action and judgment so brought and rendered in said justice's court, was a bar to the plaintiff's right to recover in this action for the cause alleged in the plaintiff's complaint; and that the plaintiff had no right to separate his demands on said contract, and maintain separate actions thereon.

The defendants, for a further answer to the complaint, admitted that at the time they took possession of the premises under said lease, there was a good and substantial barn thereon, and that in the summer of 1861 the same was alto-

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gether destroyed by fire ; but the defendants denied that they, or either of them, disregarded their duty or covenant to keep said barn in good repair, and they denied that they suffered the said barn to be destroyed by fire, or neglected to uphold the same ; but, on the contrary, they averred that they did all in their power to keep the said barn in repair, and to uphold and keep the same from destruction or injury by fire ; but said barn, notwithstanding their said care and diligence, was, at the time aforesaid, from some cause to them unknown, wholly destroyed by fire, accidentally, as the defendants verily believed ; and the defendants denied that the plaintiff had sustained damages thereby to the amount of \$500.

The cause was tried at the Cayuga county circuit, on the 8th of January, 1866, before Hon. E. DARWIN SMITH, Justice. Upon the trial, it was admitted that on the 17th day of November, 1857, the plaintiff leased to the defendants, for the term of five years, certain premises in Aurelius, Cayuga county, upon which, besides other buildings, there was a barn, of the value of \$250. That the lease was in writing, and under seal, and executed by the plaintiff and defendants, and that the said lease contained the following covenants on the part of the lessees, to wit : " To pay to the said party of the first part, the sum of one hundred and seventy-five dollars per annum, payable on the first day of April, at the expiration of each and every year. To pay all taxes to be assessed on the ninety-two acres of land belonging to the said party of the first part on lots twenty-two and twenty-eight, in said East Cayuga Reservation, excepting taxes for building new school house. To keep the buildings and fences in good repair, except natural wear and tear. To draw and spread on the premises all manure now, or which may be made, thereon during the continuance of this lease. To seed down to clover and timothy or to clover, at least fifteen acres per annum, provided the said party of the second part shall plow and sow so much grain, which said land so seeded to grass shall not be plowed again in less than two years. In seeding said land, the usual

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quantity of seed sown by good farmers shall be sown on said land. To sow winter grain in the last year of this lease, no more than ten acres. To build, during the continuance of this lease, one hundred and twenty-five rods of post and board fence, four boards high, and materials of kind usually selected and work and setting of posts well done."

It was further admitted that the said barn was destroyed by fire in the summer of 1861, and that the defendants had neglected and refused to rebuild the same. It was also admitted, that the facts set forth in the first defense, in the defendants' answer, were true.

Upon these facts, the court decided that the defendants' covenant to keep the buildings and fences in good repair, did not bind them to restore buildings destroyed by fire, to which decision the plaintiff duly excepted.

The court also decided that the plaintiff's complaint must be dismissed; to which decision the plaintiff likewise duly excepted.

Judgment of dismissal being entered, the plaintiff appealed to the general term.

James H. Cox, for the appellant.

H. V. Howland, for the respondents.

By the Court, WELLES, J. The defendants' covenant in the lease, "to keep the buildings and fences in good repair, except natural wear and tear" bound them to rebuild in case of accidental destruction by fire or otherwise. (*Comyn's Land. and Ten.* 185. 3 *Black. Com.* by Chitty, 229 mar. pag. ing, note. 3 *Kent's Com.* 467, 468 marg. pag. Chitty on Cont. 7th Am. ed. 735. *Woodfall's Land. and Ten.* 326. *Warner v. Hitchins*, 5 *Barb.* 666. *Beach v. Crain*, 2 *Comst.* 86-93. *Bullock v. Dommitt*, 6 *T. R.* 650. *Proprietors of Brecknock and Abergavenny Can. Nav. Co. v. Pritch-*

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ard et al., Id. 751.) And numerous other authorities which might be cited.

Some authorities hold that where the covenant by the lessee is to repair and leave the premises in the same state as he found or received them, or language to that effect, he is merely required to use his best endeavors to keep them in the same tenable repair, and is not bound, by such a covenant, to restore buildings destroyed, by fire or otherwise, during the term, without his fault. This is in consequence of a construction given to the covenant, that the lessee is so to repair or keep in repair the buildings, &c. as to leave the demised premises in the same state as he received them; and such I think is the settled law. But where the covenant is to repair or keep in repair generally, the buildings, &c. without the qualifying words mentioned, all the authorities hold that it requires the tenant to rebuild, &c. in case of the accidental destruction of the buildings, &c.

The action before the justice, and judgment therein, constitute no legal bar to the plaintiff's recovery in this action. The lease was for five years, and contained seven distinct independent covenants on the part of the lessees, as follows:

1st. To pay rent, &c. 2d. To pay all taxes, except taxes for building a new school house. 3d. To keep the buildings and fences in repair, &c. 4th. To draw and spread manure, &c. 5th. To seed down at least fifteen acres per annum, &c. 6th. Not to sow over ten acres of winter grain the last year of the term. 7th. To build, during the continuance of the lease, one hundred and twenty-five rods of post and board fence, four boards high.

The action before the justice was upon the last of the above covenants, for not building the one hundred and twenty-five rods of fence, which was a distinct and independent covenant from the one to keep the buildings in repair, upon which this action is brought, and had no connection with it, except that it was contained in and evidenced by the same instrument. Each covenant, if broken, gave a

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cause of action. At common law, a single count in the declaration upon breaches of both of these covenants, in an action of covenant, would, in my opinion, have been demurable for duplicity. In order to recover upon them both, in one action, the plaintiff would have been bound to set forth the two causes of action in separate counts. It is preposterous to say that the cause of action, in the suit before the justice, was identical with that for which this action was brought. The most that can be said is, that one action might have been sustained, both for not building the one hundred and twenty-five rods of fence and for not keeping the buildings in repair. In *Phillips v. Berick*, (16 John. 140,) Chief Justice Spencer, in delivering the opinion of the court, remarks: "There is no case or dictum which requires the party to join in one suit, several and distinct causes of action. It is true, the court may, to prevent vexation and cost, consolidate under some circumstances, several suits brought and pending at the same time. It is in the election of the plaintiff, if he has distinct causes of action, to sue upon all or any of them when he pleases; and he has the further election to unite in one suit, under certain restrictions, not necessary to be stated, several causes of action; but the defendant cannot compel him to do this." The doctrine on this subject is fully discussed and illustrated by the same learned jurist, in the case referred to, and the rule there laid down is unquestionably the true one. The former action must have been to recover for the same identical cause of action, or for some part thereof, as the plaintiff seeks to recover in the present action, in order to be a bar. It is undoubtedly true that where the demands are so blended as to be incapable of subdivision, a recovery in a former action for a part, would bar an action for the residue; but this is not a case of that description. The covenant to keep the buildings in repair, and that to build the one hundred and twenty-five rods of fence, are as entirely distinct as if they were contained in separate written contracts; and if so, the case is within the spirit

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and good sense of the rule allowing separate actions to be maintained.

I am aware of several adjudged cases where the language of the court seems to favor the idea, that where a party having a demand against another consisting of several distinct and unconnected items which might be embraced in one action, and all due at the same time, brings an action for one or more of such items, and either succeeds or is defeated upon the merits, he cannot afterwards maintain another action for the residue of such items not included in the first action, and that, without any agreement the legal effect of which would make the demand inseparable. Of this character are the cases of *Guernsey v. Carver*, (8 *Wend.* 492 ;) *Stevens v. Lockwood*, (13 *id.* 644 ;) *Colvin v. Corwin*, 15 *id.* 557,) and *Bindernagle v. Cocks*, (19 *id.* 207.) Some of these cases were probably decided correctly upon the facts, but all of them, I believe, are chargeable with the vice of approving, by their language, the legal heresy herein imputed to them. The true question in all such cases is, not whether the rule allowing separate actions to be maintained for separate items, would lead to a multiplicity of suits or would operate oppressively, but it is whether the former action was for the identical cause or demand as that for which the subsequent one is brought. In the latter case, where the demands in both constitute one entire, inseparable cause of action, the plaintiff is not at liberty to separate them so as to maintain separate actions for different portions of such entire demand. The foregoing views, I think, are sustained by the late case in the Court of Appeals, of *Secor v. Sturgis*, (16 *N. Y. Rep.* 548,) and also by the case of *Badger v. Titcomb*, (15 *Pick.* 409.)

For the foregoing reasons I think the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, March 4, 1867. *Wells, E. Darwin Smith and Johnson*, Justices.]

LUCY A. WARNER, adm'r, &c. *vs.* THE ERIE RAILWAY
COMPANY.

Railroad companies, as common carriers of passengers, must be held to guaranty the soundness and safety of their vehicles, their bridges, roadway and machinery.

But this rule does not apply in the case of servants of a railroad company; there being no such guaranty as between master and servant.

The remedy of a servant, against a master, for injuries maintained in the service of the latter, rests entirely upon the ground of misfeasance or negligence. For injuries sustained by a servant, in his master's employment, an action lies in these cases: 1st. Where the injury was caused directly by the personal fault, negligence or misfeasance of the master. 2d. Where the injury resulted from the careless hiring or retaining of incompetent or unskillful servants in superior positions. 3d. Where the master does not take proper precautions for the safety of his servants, but subjects them to injury by the use of unsafe machinery, or exposes them to unreasonable risks and dangers.

An action for damages, under the statutes of 1847 and 1849, by the personal representative of a deceased person whose death was caused by the wrongful act or default of the defendant, is sustainable, if at all, on the same principle as if the deceased had survived the injury and was himself the plaintiff upon the record.

In an action by the personal representative of a person who was killed while in the employ of the defendants, upon their railway, as a baggage master on a train of cars, by the breaking down of a bridge, to recover a compensation for the injury, when the plaintiff rested, on the trial, she had proved that the bridge fell from decay; that one of the chords was badly rotted, and a great many pieces of the bridge were decayed, more or less; that four or five posts were rotted at the tenons clear through; that the bridge had been built more than ten years, of timber but partially seasoned, and then painted, thus causing dry rot; and by the testimony of several experienced bridge builders, that such a bridge could not reasonably be expected to stand over from five to eight years. *Held* that upon this undisputed testimony the judge properly refused to order a nonsuit; and that he would not have been warranted in taking the case from the jury.

Although the law does not require that the directors of a railroad corporation as individuals shall possess particular professional or mechanical knowledge or skill in engineering, bridge building, or railroad construction or repairs, or that they possess more knowledge or skill in respect to such matters than men ordinarily do, yet it does require that they, as a board representing the corporation, exercise ordinary care and diligence in providing for the construction, care and maintenance of the road, and for the safety of the employees of the company, so that they be not subjected to unnecessary and unreasonable risk and danger.

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To charge a railroad company with negligence, it is not necessary to show that the directors knew, or had notice of defects in their machinery, or in the construction of the railroad, or in its bridges or otherwise. It is their duty, acting for the corporation, to anticipate decay and failure in their works and structure and machinery, and to provide against such decay and failure in season to prevent injury or damage; and a clear omission to do so, on their part, is negligence, and negligence of the corporation.

The appointment of competent and skillful agents is simply the discharge of a single duty, and will save the corporation from liability for negligence on that ground. But if skillful and competent agents neglect their duty to the injury of the servants of the corporation, or others, the corporation is not absolved. Such neglect is still the neglect of the corporation.

The exemption of a principal from liability to a servant for an injury inflicted by the negligence or want of care of a fellow servant, extends to all cases where the servants are strictly *fellow-servants* in the same department of service, and are not subject to the order or control of each other.

All subordinates who are under the control of a superior, are entitled to hold such superior as representing the master, and the master as responsible for his incompetency or misconduct.

Thus where a railroad corporation, through its board of directors and its other agents acting under their authority, is guilty of negligence in not taking the proper care and precaution to see to it and know that a bridge is safe and secure, and a baggage master in its employ is killed by the breaking down of such bridge in consequence of decay, the corporation is liable in an action for damages, brought by the personal representative of the deceased.

THIS is an action to recover damages, arising from a personal injury, which resulted in the death of Andrew J. Warner, the plaintiff's intestate, one of the defendants' employees. The deceased was a baggageman, and, when killed, was in the discharge of his duty, as such, on a train of cars going from Hornellsville east, on the defendants' railroad. One of the defendants' bridges, over the Conhocton river, fell as the train of cars was passing over it. The jury found the bridge fell from decay in its timbers. The bridge was claimed by the defendants to have been properly constructed, and was originally of sufficient strength for the purposes for which it was intended. The court, on the trial, held that there was not any thing, in that respect, to submit to the jury.

The court held that there was only one question in the case to be submitted to the jury, and that was, whether the

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board of directors themselves, as representing the defendants, and as distinguished from the employees, were guilty of negligence in not discovering the fact that the bridge was in an unsafe condition. That if the jury should be satisfied, from the evidence, that the bridge was unsafe from decay, and that occasioned its fall, and the board of directors were guilty of negligence in not discovering the fact that the bridge had thus become unsafe, then the plaintiff would be entitled to recover, and that that question alone must go the jury.

The counsel for the defendants moved for a nonsuit, and insisted that there was nothing showing any negligence on the part of the board of directors. The court decided the case must go to the jury on the question stated. The defendants' counsel excepted.

The defendants' counsel also moved for a nonsuit, at the close of the plaintiff's case, on two grounds,

1st. That there was not any evidence tending to show that the injury arose from negligence on the part of the defendants.

2d. That the complaint alleged that before the bridge fell, the defendants had notice it was unsafe and insecure; that there was not any evidence in the case tending to show any knowledge, on the part of the defendants, or notice to them, that the bridge was unsafe, or insecure; that such knowledge or notice, was, in this case, necessary to entitle the plaintiff to recover.

The court refused to nonsuit the plaintiff, and the defendants' counsel excepted.

In submitting the case to the jury, the court instructed them, among other things, "that, in order to charge the defendants, it is necessary to show that the decay in the bridge, if it fell from decay, was known to some of the defendants' employees, and an omission, on their part, thereafter, to remedy the defect."

Thereupon the counsel for the defendants requested the court to take the case from the jury, as there was no evidence tending to show any such knowledge, or omission. The court

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refused to take the case from the jury, and the defendants' counsel excepted.

The defendants' counsel asked the court to instruct the jury that, in order to charge the defendants, it was necessary to show that the decay in the bridge, if it fell from decay, was known by some notice, or otherwise, to the president and directors. The court refused to so instruct the jury without qualification. The defendants' counsel excepted to this refusal. The court, however, did instruct the jury, as last above requested, with the qualification and addition, "that if the board of directors, by the exercise of that skill and prudence which is to be expected of persons occupying the same position, should, by the exercise of reasonable diligence and skill, have ascertained or known, the defect in this bridge, the failure to ascertain, on their part, would make the defendants liable, because it is negligence, and substantially the same as if notice had been given the board."

The defendants' counsel excepted to this part of the charge given by way of qualification and addition.

The jury rendered a verdict against the defendants for \$5000. A motion was made for a new trial, on a case containing exceptions. The court denied the motion. This appeal is from the order denying such motion.

John Ganson, for the appellants. I. The court erred in refusing to nonsuit the plaintiff. There was not any evidence tending to show that the bridge was not originally sufficient, nor that the employees, who were intrusted with the supervision, examination and repairing of the bridge were incompetent. This was, in effect, conceded on the trial, and the court so determined. The common employer is not responsible to one servant for the negligence of a fellow-servant. The court on the trial so held in this case. (*Tenant v. Webb*, 86 Eng. Com. Law Rep. 96. *Albro v. Agawam Canal Co.*, 6 Cush. 75, 77. *Priestly v. Fowler*, 3 Meeson & Wels. 1.

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Hutchinson v. The York N. and B. R. Co., 5 *Each. R.* 343. *Wigmore v. Jay*, *Id.* 354. *King v. The Boston and Worcester R. B. Co.*, 9 *Cush.* 112. *Seaver v. Boston and Maine R. B. Co.*, 14 *Gray*, 466. *Coon v. Syracuse and Utica R. R. Co.*, 1 *Seld.* 492. *Hayden v. Smithville Manufacturing Co.*, 29 *Conn. R.* 548. *Wright v. New York Central R. R. Co.*, 25 *N. Y. Rep.* 562, 566.) The court, on the trial, also decided that the defendants were not liable unless the jury should, from the evidence, become satisfied that the board of directors themselves, as representing the defendants, and as distinguished from the employees, were guilty of negligence in not discovering the fact that this bridge was in an unsafe condition.

II. There was nothing in the evidence upon which a finding of negligence, on the part of the board of directors, could be predicated. The board of directors had originally constructed a bridge sufficient for the purpose for which it was intended. It had served that purpose for nine years and eight months. The board of directors had employed competent mechanics to supervise, examine, repair and reconstruct the bridge whenever it was necessary. These competent persons frequently examined the bridge, and made a thorough examination the day before it fell. They did not then discover, and had at no time before discovered, any defect in the bridge. They had never reported it as defective; they did not know, they had never heard, or suspected, even, that it had become defective.

III. The court, in effect, decided that the law requires something more of the board of directors than to furnish a sufficient bridge, and to employ competent and skillful men to examine, repair and reconstruct it when necessary. That, notwithstanding the defendants' board of directors had originally furnished a sufficient bridge, and had employed competent and skillful mechanics to take charge of it, and examine, repair and reconstruct it, when necessary, they had not discharged their full duty, in this respect, to their employees.

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Although the board of directors had, in these respects, done all that could be required of them, still another duty rested on them; and that was *they* should, as a board of directors, by the exercise of reasonable *personal* diligence and skill, have ascertained, *themselves*, whether the bridge had become defective. The failure, on *their* part, to ascertain the defect, if it might have been ascertained by that skill and prudence, which is to be expected of persons occupying the same position, was such negligence as rendered the defendants liable. This instruction to the jury, when taken in connection with what it was conceded the defendants' board of directors had done, in effect states the law to be that a board of directors must be composed of persons having more skill than the mechanics they employ. That the employment of suitable and skillful mechanics to attend to matters, requiring the exercise of mechanical skill, does not relieve a corporation from obligation to answer its employees for the damages which they may sustain from the negligence of their fellows.

IV. The court instructed the jury "that, in order to charge the defendants, it is necessary to show that the decay in the bridge, if it fell from decay, was known to some of the defendants' employees, and an omission on their part thereafter to remedy the defect." There was not any evidence tending to show such knowledge, and the court should have taken the case from the jury, when requested to do so by the defendants' counsel. This was the law of the case, and, on this motion, must be so regarded. Where, on the trial of a cause, the jury are instructed, in respect to the rule of law which they are to apply, as requested by the defendants, and a verdict passes against them, and they move for a new trial on the ground that the verdict is contrary to the evidence, the defendants have a right, on such motion, for all the purposes of the motion itself, to insist that such instruction is correct. (*Bunten v. The Orient Mutual Insur. Company*, 4 Bosw. 254.)

V. The court erred in charging the jury, under the facts

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in this case, that there was a duty resting on the defendants, so far as its employees are concerned, beyond furnishing a sufficient bridge and employing competent mechanics to examine it, and providing ample means for repairing, and "reconstructing" it. After the defendants had furnished such a bridge, employed such mechanics and provided such means, nothing short of notice to the board of directors, or at least to some of its employees, that the bridge had become defective, and an omission, thereafter, to remedy the defect, could render the defendants guilty of negligence, so as to make them liable to one of its employees. The master does not guaranty to his employees that the instruments furnished them to perform their work, shall continue to be sufficient, and that if they, from use, become defective without his knowledge, he will be liable to them for any damage they may thereby sustain. Knowledge or notice of the defect, in such case, is a necessary element to make out negligence. (*Kenyon v. The Western R. R. Co.*, 4 *Seld.* 175. *Price on American Railroad Law*, 294. *King v. The Boston and Worcester R. R. Co.*, 9 *Cush.* 112. *McMillan v. The Saratoga and Washington R. R. Co.*, 20 *Barb.* 449. *Langlois v. The Buffalo and Rochester R. R. Co.*, 19 *id.* 364. *Priestley v. Fowler*, 3 *Mees. & Wels.* 1.)

Sherman S. Rogers, for the respondent. I. It was conceded at the trial, and the court correctly charged, that negligence by the board of directors was the negligence of the master, and not of the employees.

II. That there was evidence of negligence by the employees, or the master, or both, cannot be disputed. That negligence consisted in allowing the bridge to stand, when, from its age and construction, and tendency to decay, it was probably unsound, and in not making an adequate examination of it to test its soundness; an examination which, if made, would have shown it to be unsafe.

III. Negligence is the failure to discharge a duty. In

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order then to determine whether the directors of the defendants have been guilty of negligence, it is necessary to determine what was their duty. In the outset of the inquiry it is proper to reiterate the statement that the *directors stand in the place of the master*. They are, for all the purposes of the question under discussion, the corporation itself in bodily form. Upon them, therefore, are imposed all the duties which the master owes to his servant. The case is not otherwise, in this behalf, than it would be were the defendants a copartnership firm, composed of the individuals who in point of fact constituted its board of directors. This must be so; otherwise as a corporation can act only through agents, officers and servants, the servant has no responsible master to whom he can look for the discharge of those duties which he has a right to require from his master, in the furnishing of competent fellow servants and suitable appliances for his work. What then were the duties of the board of directors in this case? The defendants claim that having provided a bridge which was originally sufficient, the master's duty was discharged by appointing a suitable person master of its bridges, and furnishing competent subordinates. That the directors had a right to rely upon those employees for a proper discharge of their duties. That it was a part of their duty to ascertain when the bridge became unsafe, and if they failed to do so, the negligence was that of the co-employees of the intestate, and not that of the board of directors. We reply, first, in the language of the second point made by the respondent in the argument of the former appeal in this case, to which the court is respectfully referred; and, second, that the duty of the master is not fully performed when he has furnished a suitable bridge and provided competent servants to take charge of it. He cannot withdraw from all supervision of his business and entrust it wholly to servants, for this would be practically to deprive the servant of a responsible master to whom he might look for the performance of the

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implied obligations existing from the master to the servant in relation to providing suitable fellow servants, etc.

It is, therefore, the master's duty to use a reasonable supervision of his business. It is his duty to use such diligence in requiring his servants to perform their duties. Competent servants may be careless. Careful servants may at times be negligent. A bridge which was originally sufficient may become unsafe, and the master, as a person of ordinary intelligence, may have reason to believe that it has become unsafe, and he cannot without fault upon his own part, neglect to cause such an examination to be made as will at the same time determine that question, and also the question whether his servants, to whose care he has entrusted it, have not been negligent in the examination made by them. To illustrate by the case at bar, changing it in a single feature only for the purpose of more forcibly presenting the argument; the change, however, in no way affecting the principle involved.

Suppose, then, this bridge had stood *for twenty-five years*, so that by the concurrent testimony of all the witnesses it had out-lived its probable life by many years. The directors knew when it was built. They knew how and where it was built. There is nothing so recondite in the subject, as that, being reasonably intelligent men, they may not be presumed also to know, from the nature of the case, that the bridge has probably become unsafe and that it ought to be rebuilt. Have they then done their duty? Can they say: "It is true, that we knew all these things, but we cannot be expected to give our personal supervision to such matter. We hired a competent and careful master of bridges, and gave him suitable subordinates. We relied upon them." This would not do. The obvious reply would be: "Conceding that the employees, who had the bridge in charge, were competent men, you had notice, from the very nature of the case, not only that the bridge was probably unsafe, but that those employees, in all probability, had not done their duty. There

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was negligence on your part, therefore, in that you did not ascertain the fact in this behalf." The case is the same in principle, as if some person had gone to the board of directors and informed them that he had examined the bridge, and discovered it to be dry rotted in its essential parts, and they had disregarded the notice.

In the case at bar, the directors had circumstantial evidence, so to speak, of the probable unsoundness of the bridge. In the one supposed, they have direct testimony as to the fact. If, in the one case, they might skulk behind their servants, saying, "we employed competent men, and we relied upon them to do their duty," so may they in the other.

It follows that the instruction of the court was correct, for having notice of the probable unsoundness of the bridge, and that the defendants' servants had probably not done their duty, the directors took no measures to ascertain the facts in this behalf. If they had done so, the jury were well warranted by the evidence, in finding that the unsoundness of the bridge would have been detected.

IV. The verdict was not against the weight of evidence. On the contrary, the evidence well sustained the verdict.

The entire evidence, on this subject, forces upon the mind the conclusion, that the defendants were running their trains over this, and similar bridges, beyond the time when it was probably safe to do so ; thereby hazarding the lives of their employees and passengers, upon the chance that *perhaps* the old structures would carry their burthens safely.

V. The charge of the court, in response to the requests of the defendants' counsel, was in all respects correct, except as to the third and fifth requests, and the error in the charge upon those requests, was against the plaintiff ; of this the defendants cannot complain.

E. DARWIN SMITH, J. The plaintiff's husband was killed while in the employ of the defendants in the capacity of a baggage master upon a train of cars running upon the de-

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fendants' railroad, by the breaking down of a bridge upon the line of said railroad. The proofs clearly show, and it is indisputable, that said bridge fell in consequence of the decay of some of its timbers by what is called the dry rot, not ordinarily discoverable upon the surface of the timber.

The question presented in this case is whether the defendants are liable to the plaintiff, under the statutes of 1847 and 1849, of this state, giving the representatives of a deceased person, whose death has been caused by the wrongful act or default of any persons or corporations, an action for the recovery of a compensation for the injuries resulting from such death. If the intestate had been a passenger in the cars which fell through the bridge in question, no doubt would have existed as to the defendants' liability, for the defendants, as common carriers, in such case, must be held to guaranty the soundness and safety of their vehicles, their bridges, roadway and machinery. (*Alden v. New York Central Railroad Co.*, 26 N. Y. Rep. 102, and 24 *id.* 201.) But the plaintiff's husband being a servant of the defendants, this rule does not apply in this case, as there is no such guaranty as between master and servant. The remedy of a servant against a master, for injuries sustained in his service—and this action is sustainable, if at all, on the same principle as if the plaintiff's husband had survived the injury and was himself the plaintiff upon the record—rests entirely upon the ground of misfeasance or negligence. For injuries sustained by the servant in his master's employment an action lies in three cases: 1st. Where the injury was caused directly by the personal fault, negligence or misfeasance of the master. (*Ryan v. Fowler*, 24 N. Y. Rep. 413, and the cases there cited.) 2d. When the injury resulted from the careless hiring or retaining of incompetent or unskillful servants in superior positions. (*Ormond v. Holand*, 96 Eng. Com. Law, 100. 1 *Redfield on Railways*, 520, §§ 131 and 138. *Frazier v. Pennsylvania Railroad Co.*, 38 Penn. R. 104. *Snow v. Housatonic Railroad Co.*, 8 Allen, 441.) 3d. Where the

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master does not take proper precautions for the safety of his servants, but subjects them to injury by the use of unsafe machinery, or exposes them to unreasonable risks and dangers. (*Noryed v. Smith*, 28 *Verm. R.* 59. *Patterson v. Wallace*, 28 *Eng. Law and Eq.* 48-51. 1 *Redf.* 522. *Marshall v. Stewart*, 33 *Eng. Law and Eq.* 1.)

At the close of the trial in this cause, the learned circuit judge held that there was no evidence for the jury, tending to establish that the bridge in question was originally insufficient, or negligently constructed, or impeaching the competency of the defendants' employees, thus in effect narrowing the inquiry to the single issue whether the defendants were guilty of neglect in exposing the plaintiff's husband to danger, and not taking sufficient care and precaution for the safety of their employees in respect to the bridge in question. The case comes here on appeal from an order of the special term, denying a new trial, but it was discussed chiefly upon the exceptions taken upon the trial, and I think the decision of these exceptions will properly dispose of the whole case.

The first point discussed by counsel was the exception to the refusal of the circuit judge to order a nonsuit, at the close of the plaintiff's case. When the plaintiff rested, she had proved that the bridge fell from decay; that one of the chords of the bridge was badly rotted, and a great many pieces of the bridge were decayed, more or less; that "four or five posts were rotten at the tenons clear through;" that the bridge had been built ten years ago, of timber but partially seasoned, and then painted, thus causing dry rot; and by the testimony of several experienced bridge builders, that such a bridge could not reasonably be expected to stand over from five to eight years. Upon this undisputed testimony, I think the circuit judge would not have been warranted in taking the case from the jury. The plaintiff's testimony certainly tended to establish at this stage of the trial, that this bridge had been retained in use by the defendants several years after it should have been rebuilt or repaired, and had

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not been subjected to any proper tests to ascertain its true condition as developed by inspection of its timbers after its fall. This exception, I think, therefore, is not well taken.

But this case really turns and depends chiefly, I think, upon the principles asserted in, and the exceptions taken to, the charge. After the charge, the counsel of the defendants made several requests to the circuit judge to charge, and the judge charged in several instances as requested. In one of the requests the judge was asked to instruct the jury that in order to charge the defendants it was necessary to show that the decay in this bridge, if the bridge fell from decay, was known to some of the defendants' employees, and an omission on their part thereafter to remedy the defect. To this request the judge said, "yes, to this proposition, if the defendants were satisfied to have the jury so instructed." The counsel thereupon requested the judge to take the case from the jury, as there was no evidence tending to show such knowledge or admission. The circuit judge refused to do so, and the counsel then duly excepted.

If the defendants' counsel had been content to rest upon this exception, I think it would have been a valid one, for it is quite clear that there is no evidence in this case that would have warranted the jury in finding that the defendants omitted to repair this bridge after any of their employees knew of its decay and unsoundness. But this request and instruction, I think, was virtually waived by the counsel, and revoked by the judge in the subsequent request of the counsel, and the final instructions by the judge to the jury.

The defendants' counsel then requested the court further to instruct the jury that in order to charge the defendants, it was necessary to show that the decay in this bridge, if it fell from decay, was known, by some notice or otherwise, to the president and directors. "The court said, this is so with this addition and qualification: That if the board of directors, by the exercise of that skill and prudence which is to be expected by persons occupying the same position, could have

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ascertained or known the defect in the bridge, the failure to ascertain it on their part would make the defendants liable, because it is negligence, and substantially the same as if notice had been given to the board."

To this charge, as given, and as it varied from the request, the defendants duly excepted. This exception presents the chief point upon which the action depends, and the instruction to which it relates, doubtless led to, and constitutes the basis of the verdict rendered in the cause. This instruction coincides with the general tenor of the charge, and is in substance nothing more than a repetition of the leading idea running through it.

The learned judge had previously said in this charge, that "the defendants being a corporation, the only manner in which they could be recognized as having a tangible existence was by means of its board of directors; that such board, for the purposes of this action, might be regarded as the corporation itself; that such board was the responsible agent whose acts are drawn in question in the controversy in this case; that the question was whether the board of directors had been guilty of a want of proper care and diligence; that it was the duty of such board, so far as it could be done by the exercise of reasonable skill and diligence, to see that the road was properly constructed; that the bridge was put up in a proper manner and maintained in an ordinary, reasonable and firm condition for the purpose and use for which it was intended; that if the board of directors failed to discharge that duty, then the defendants would be liable for any injuries occasioned thereby to any person in their employment."

The difficulty in this case, in stating and applying to the evidence the rules of law applicable thereto, arises entirely out of the fact that the defendants are a corporation, acting by, and performing all their rights, and exercising all their functions and duties through the instrumentality of numerous officers and agents. A certain degree of confusion of

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ideas, or indistinction, seems for this reason to attend the examination and decision, in many instances, of the cases constantly arising in the courts against railroad and other corporations. The courts have been embarrassed in their efforts to apply to these corporations the same rules of law which apply to natural persons; and to hold corporations to the same measures of responsibility toward their employees that exists between master and servant in other relations of labor or service. When it was first decided in our courts that common carriers might exempt themselves from responsibilities by express contract, I perceived that the tendency of this doctrine, in connection with the other kindred doctrine, that the principal is not liable to the agent for injuries received from the negligence of another agent in his employment, was in a large degree, if not entirely, to strip the employee of corporations of that right of protection from his master or employer, and redress for injuries received, that existed at common law, as between natural persons. It was in reference to this tendency of these two doctrines that I said, in *Bissell v. The New York Central R. R. Co.* (29 Barb. 613,) that "when a railroad or other corporation assumes the duty of common carrier, and acted, as they must, entirely by officers and agents, I concur that they could not contract for exemptions from responsibility for whatever pertained to the *proprietaryship* of the railroad, nor for the acts of that class of superior agents who act for and in place of the corporation as officers, directors or other managing agents, and who, as such, within the trusts confided to them, control and direct the operations of the corporation, and employ its inferior servants and agents," and insisted that such officers or agents should be decreed to represent the corporation, and stand in its place in respect to all rights of third persons. I reiterated the same views in *Perkins v. The same railroad Co.* (24 N. Y. Rep. 218, 219 ;) and the case of *Smith v. The same railroad Co.* (*Id.* 236,) was decided by my vote upon the same grounds, that the negligence, which in that case consisted in the use

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of an unsafe car, was that of the corporation itself, and could not be thrown off upon any officer or agent. In the same volume, (*page 410*;) in the case of *Ryan v. Fowler*, the whole court had no difficulties in concurring with me in asserting and applying the rule that a master is bound to provide for the safety of his servant as between natural persons, precisely the same rule in effect asserted by the learned circuit judge in this case, except that he applied it to a corporation for the neglect or omission of its board of directors. The objections to this charge and the instructions in question are really, it seems to me, nothing more than that the learned judge applied the same law to a railroad corporation, through its board of directors, that he would have applied to a natural person under the same circumstances; holding the corporation responsible for their neglect as though they were the corporation in fact, or as though they were natural persons acting for their own interests.

The fifth point in the argument of the learned counsel for the defendants is as follows: "The court erred in charging the jury, under the facts of the case, that there was a duty resting on the defendants so far as their employees are concerned, beyond furnishing a sufficient bridge and competent mechanics to examine it and provide ample means for repairing and reconstructing it."

The third point is also as follows: "The court, in effect, decided that the law requires something more of the board than to furnish a sufficient bridge and to employ competent and skillful men to examine, repair and reconstruct it when necessary." The whole tendency of this argument is to claim exemption for the defendants from all duty to their employees as *master*, after they, the directors, had caused the road to be properly constructed, and employed proper agents to control and run it. The learned counsel says further, in his points in respect to the charge and directions of the circuit judge: "That notwithstanding the defendants' board of directors had originally furnished a sufficient bridge and em-

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ployed competent and skillful mechanics to take charge of it and examine and repair and reconstruct it, when necessary, they had not discharged their full duty in this respect to their employees." This argument, if I do not misconceive it, and I have quoted it quite fully to avoid mistake, it seems to me does in effect contend for, and asserts, a rule of law which would strip every railroad laborer, or employee, of all protection from, or redress against, any master or principal after the railroad is completed and its control put into the hands of agents reputed to be competent. The argument of the defendants' counsel further objects to this charge, "that although the board of directors had done all that could be required of them in the employment of suitable and skillful mechanics to attend to the matters of said road requiring mechanical skill, still it imposes another duty upon them, and that was that they should as a board of directors, by the exercise of reasonable personal diligence and skill, have ascertained, themselves, whether the bridge had become defective, and that the failure on their part to do so was such negligence as rendered the defendants liable in this action." The learned circuit judge did not mean to be understood by the jury, and I think could not have been so understood, that the directors of the defendants' company were bound to give their individual personal charge to the details of the business of conducting the said railroad, or of running the trains thereon, or that they should possess particular scientific or mechanical skill in respect to the work of constructing, maintaining or repairing said railroad or its machinery. It is doubtless true, as suggested by defendants' counsel, that these directors, in fact, were scattered over the country and seldom met, and knew little in fact, personally, of the actual practical operations of said road, and that they probably, as a board, did little more, individually, than appoint a superintendent, chief engineer and other officers and agents to take special personal charge of the details of its business, the selection and employment of its subordinate agents, engineers

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and other employees. The law, doubtless, does not require that the directors of a railroad corporation, as individuals, should possess particular professional or mechanical knowledge or skill in engineering, bridge building or railroad construction or repair, or that they possess more knowledge or skill in respect to such matters than men ordinarily do, but it does require that they, as a board representing the corporation, exercise ordinary care and diligence in providing for the construction, care and maintenance of the railroad of which they are the exclusive governing and controlling body; that they execute the trust confided to them by the stockholders with fidelity and care, by providing with reasonable care and caution for the safety of the employees of the company, so that they be not subjected to unnecessary and unreasonable risks and danger in the service and work of the company.

It is not necessary to charge the defendants with negligence, that the directors knew or had notice of defects in their machinery, or in the construction of the railroad, or in its bridges or otherwise. It is their duty, acting for the corporation, to anticipate decay and failure in their works and structure, and machinery, and provide against such decay and failure in their works in season to prevent injury or damage; and a clear omission to do so on their part is negligence, and negligence of the corporation. It matters not that they employ skillful and competent agents, and trust to such agents. The appointment of competent and skillful agents is simply the discharge of a single duty. It will save the corporation from liability for negligence on that simple ground.

The appointment of unskillful or incompetent agents would of itself, if knowingly and heedlessly done, as we have seen, constitute negligence and give a cause of action to any person injured by such neglect. But if skillful and competent agents neglect their duty to the injury of other servants of the corporation or others, the corporation is not absolved. Such neglect is still the neglect of the cor-

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poration. Unless the directors and that class of superior agents who do the work of the principal, who employ its operatives and set its machinery in motion, stand thus in legal effect in the place of a master to the subordinate agents and workmen, then such subordinates have really no protection from any superior or master or employer, and must look to such agents individually and personally, many of whom doubtless will be found entirely worthless, for redress for any injury sustained from their negligence, default or misfeasance. If the circuit judge, instead of instructing the jury that it was the duty of the directors of the company to provide for the safety of the employees of the company, had advised them in the ordinary phraseology that it was the duty of the defendants to have done so, this language would have been clearly unexceptionable, but the inquiry then would have been who should discharge this duty. The defendants are a corporation without soul—a mere legal myth. Some human, intelligent moral agent must act for it and perform the duty of its legal ideal personality. Such agency must of necessity primarily be the agency created by the stockholders who are the real corporation. This agency, in the first instance, is the board of directors, and next to them and under them, the president, executive committee, superintendent, chief engineer and bridge builder, or other officer appointed by such board of directors. Such agent, in his particular department, by whatever name he may be called, who did in fact fulfill the duties of the directors or corporation as proprietor or master in his sphere, who did the work and performed the functions of principal or master and controlled in whole or in part the actual operations of the corporation, must be held to bind the corporation as *master* in respect to all its subordinate agents or servants, precisely as if no corporation existed and such persons were acting in their own behalf and for their own benefit.

In this view the charge and instructions are entirely right. These defendants were held liable for the neglect of the board

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of directors not as individuals but as representatives of the corporation, and they were held to bind and commit the said corporation precisely as if they were simply partners owning and controlling the defendants' railroad for their own use and benefit. (*New York and New Haven R. R. Co. v. Schuyler*, 34 N. Y. Rep. 30.) I am not surprised at the extreme ground taken in the argument by the learned counsel, that a railroad corporation when it has completed its road and commits its control to the hands of suitable, skillful and competent agents, is relieved from all obligations to answer its employees for damages which they may sustain from the negligence of their fellows. It is but a legitimate argument and conclusion from some of the later decisions following in the wake of *Priestley v. Fowler*, (3 Mees. & Welsb. 1;) and *Farwell v. B. and W. R. R. Co.*, (4 Metc. 49,) holding that a principal is not liable to any of his agents or servants for injuries sustained through the negligence of another servant or agent.

But this rule cannot prevail to this extent, unless the courts are prepared to hold that a corporation cannot commit a wrong; cannot be guilty of a negligence; and that redress for injuries arising from negligence, misfeasance, default or wrong, can only be obtained of the person doing the wrong, or committing the injury; for it is quite true that all negligence, fault or wrong, presupposes an intelligent human agent, capable of committing crime, and of omitting and of violating duty, and of inflicting injury.

The tendency of the later decisions to lead to this conclusion, as between corporations and their agents and employees, I am pleased to see, has awakened attention, and is causing some reaction in the courts. In a recent case, in the Court of Appeals of Kentucky, (*The Louisiana and Nashville R. R. Co. v. Collins*, 5 Am. Law Reg. N. S. 265,) this question has received discussion, and the rule as declared in *Priestley v. Fowler*, and the American cases following that

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case, repudiated in part, or rather restricted to what I think is its true limit—to those who are *fellow servants* in the same grade of employment, and who are not subject to the order or control of the others. In that case the plaintiff, a common laborer, in the employ of the defendants, was run over while discharging a duty to which he was assigned, by the carelessness of an engineer in the use of one of the defendants' locomotives. The court held that they were not fellow laborers; that the company was responsible for the negligence of the engineer; that the corporation were bound to observe care and vigilance and skill in proportion to the danger of neglect involved in the steam operations on a railway, and that in all those operations the invisible corporation, though never actually, is yet always constantly present, through its acting agents, who represent it, and whose acts, within respective spheres, are its acts.

In his note to this case, which is also inserted in his recent work upon the law of Railways, (*vol.* 1, 531,) the learned chief justice of Vermont says, in reviewing the English and American cases: "It is safe to hold the rule to be that the exemption of the principal from liability in these cases, extends to all cases where the servants are strictly *fellow servants* in the same department of service;" and also that "all subordinates who are under the control of a superior, are entitled to hold such superior as representing the master, and the master as responsible for his incompetency or misconduct."

This is the sound rule on this subject, in my opinion, and coincides with what I have long insisted should be the law, in the cases of *Bissell v. Perkins*, (*supra*,) and other cases. Upon the whole, within the principle thus asserted, I think this case was properly disposed of at the circuit, and that the defendants were simply held, through their then directors, to their just and proper responsibility. Under the charge, as I think it should be construed, the jury must have found, in substance and to the effect, that the defendants, through their board of directors, and their other agents

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acting under their authority, were guilty of negligence in not taking the proper care and precaution to see to it and know that the bridge in question was safe and secure.

Considering the rule of duty on the part of the corporation to the public, in such case, to be that it is bound, for the protection of human life, and when it is in such constant peril, to exercise the highest degree of care, "the utmost care and skill," as Judge Gardiner says, (*Hegeman v. The Western R. R. Co.*, 13 *N. Y. Rep.* 26,) the jury must have been satisfied that the defendants in keeping this bridge in use beyond the period of five, or at the most of eight years, which the plaintiff's engineer and bridge builder considered the utmost period of its life, without repair and without inspection or examination by the application of any sure and proper tests to determine its soundness, were guilty of an omission of that care and prudence and duty which was demanded of them under the circumstances of the case. I do not think we can hold that this finding of the jury is so clearly without evidence, or against the weight of the evidence, as to warrant us in granting a new trial upon that ground. I think a new trial should, therefore, be denied, and a judgment ordered upon the verdict.

DANIELS, P. J. concurred.

MARVIN, J. dissented.

New trial denied.

[ERIE GENERAL TERM, September 2, 1867. *Daniels, Marvin and E. D. Smith*, Justices.]

CLARK *vs.* THE CITY OF LOCKPORT.

In case of a village or city, where the trustees, or common council, are made commissioners of highways, the corporation is liable for their negligence in not repairing the highways within the corporate limits.

Where a street in a city was in an unsafe condition, so that a person knowing its condition would have been guilty of negligence in attempting to use it by driving through it, but the danger was concealed by a snow that had recently fallen; *it was held* that a traveler was not bound to know that water crossing the street had congealed into ice, which was covered by the snow; and he was not, therefore, chargeable with negligence in attempting to pass along the street, with his horse and buggy.

And the referee having found that the plaintiff had sustained damages by a fall, caused by the dangerous condition of the street, and the negligence of the city in not putting and keeping the street in proper repair, and that he was free from negligence or fault; a judgment in favor of the plaintiff, against the city, was affirmed.

A PPEAL from a judgment entered on the report of a referee. The action was brought to recover damages for injuries sustained by the plaintiff in his person and property through the negligence of the defendants.

Gardner & Scripture, for the plaintiff.

Ely & Crowley, for the defendants.

By the Court, MARVIN, J. The referee has found, from the testimony, which is quite voluminous, that at the time of the receiving of the injury complained of by the plaintiff, and for a long time previous thereto, Garden street, in the city of Lockport, was materially out of repair, and dangerous, unsafe and unfit for public use and travel, and that the defendants had notice of these facts and neglected to put or keep the street in proper and sufficient repair for public use and travel. That the plaintiff was traveling along said street with his horse and buggy, on the 10th day of January, 1866, and was, with his horse and buggy, precipitated or fell from the side of the street down a declivity some fifteen to

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twenty feet, and was thrown from his buggy and was badly bruised and wounded, and his buggy was injured and broken. That such fall was caused by the dangerous, &c. condition of the street and the negligence of the defendants in not putting and keeping the street in proper and sufficient repair, and was without negligence or fault on the part of the plaintiff. That the plaintiff sustained damages to the amount of \$660. Conclusion of law, that the plaintiff have judgment for that sum, with costs, &c. Exception to the finding of facts; also to the conclusion of law.

Upon the argument two questions were made: 1. That the finding that the injury was without negligence or fault on the part of the plaintiff, is against evidence. The defendants' counsel claimed that the plaintiff was negligent, and that his negligence contributed to the injury suffered by him. 2. That the action could not be sustained against the city; in other words, that the city was not liable.

I have examined the evidence touching the negligence of the defendants, and the plaintiff, and am entirely satisfied that the judgment ought not to be reversed upon the ground that the findings of facts by the referee are against evidence, or unsupported by the evidence. The street was in an unsafe condition, and had its condition been fully known to the plaintiff it would have been negligence in him to attempt to use it by driving his horse down along it. But the condition of the street was concealed by the snow that had fallen the night previous to the accident. I do not think the plaintiff was bound to know that ice had formed under the snow; that water oozing from the race had crossed the street and been converted into ice upon the street. One possessed of extraordinary caution might, perhaps, have declined going down the street without making some examination as to the condition of the street, as a light snow had just fallen, and no one had passed over the road since the fall of the snow. Mud and snow were in the upper part of the street; and driving over it, there, was not dangerous, but

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lower down, where the water, in small quantities, crossed the street, it had congealed into ice, and the ice was covered by the snow. I do not think that the plaintiff was bound to know this, or to suppose that such might be the fact. The street, at the place of the injury, was and had been for some time in a dangerous condition.

Upon the whole, the judgment cannot, in my opinion, be reversed upon the ground that the findings of fact are unsupported by the evidence.

This leaves for consideration the question whether the city was liable in this action to respond in damages. It will only be necessary, in disposing of this question, to refer to some cases decided, within a few years past, by the Court of Appeals.

See *Conrad v. The Trustees of Village of Ithaca*, (16 N. Y. Rep. 158,) in which Judge Denio refers to a decision of the Court of Appeals in *Hickok v. The Trustees of the Village of Plattsburgh*, where it was decided that in case of a village, where the trustees were made commissioners of highways, the corporation was liable for their negligence in not making a repair, viz. not filling up a ditch which a wrongdoer had excavated in the street.^(a) This decision of the Court of Appeals was reached by adopting the opinion of Justice Selden delivered at special term, in *Weet v. The Trustees of the Village of Brockport*, and which is published in a note in *Conrad's* case. The case of *Hickok* is in point, in this case, and must be followed by this court. I gave my opinion at large concerning this decision and Justice Selden's opinion, in *Peck v. The Village of Batavia*; and I still think that the very learned judge was in error in *Weet v. The Trustees of Brockport*; and that the Court of

(a) By the charter of the city of Lockport, title 5, section 1, (*Laws of 1865*, p. 670,) it is declared that the common council shall be commissioners of highways in and for said city, and shall have all the powers, and discharge all the duties, of commissioners of highways in the towns of this state, subject to the provisions of such charter. REP.

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Appeals erred in adopting the opinion and applying it to *Hickok's* case. The doctrine of this case is, however, approved in *Storrs v. The City of Utica*, (17 N. Y. Rep. 104.) See Judge Denio's opinion in *Mills v. The City of Brooklyn*, (32 N. Y. Rep. 489.) In that case it was held that a municipal corporation is not liable to a private action for damages accruing from not providing sufficient sewerage for draining the plaintiff's premises. It will be seen that Judge Denio did not concur in the decision in *Hickok v. The Trustees of the Village of Plattsburgh*.

The judgment must be affirmed.

[ERIE GENERAL TERM, September 2, 1867. *Daniels, Marvin and Davis*, Justices.]

SEIBERT vs. THE ERIE RAILWAY COMPANY.

The positive testimony of an unimpeached, uncontradicted, witness, cannot be discredited or disregarded, arbitrarily or capriciously, by court or jury.

Although it belongs to a jury, in considering the weight of evidence, to pass upon the credit due to the respective witnesses, this does not imply that they may, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted, witness, who testifies fairly, and gives clear, rational, consistent and relevant testimony.

For judicial purposes, all witnesses stand upon a par, and must be believed in their testimony, unless discredited by the inconsistency, incredibility, or improbabilities, of their statements, on cross-examination, or otherwise contradicted by other witnesses, or impeached in respect to their general character for integrity or truth.

Where, in an action against a railroad company, to recover damages for a personal injury, there was no pretense that there was any negligence on the part of the defendants, which could sustain the action, except in the omission of the engineer or person in charge of the defendants' locomotive to ring the bell, or sound the whistle, at a street crossing; and the testimony of the engineer, upon that point, was positive and unqualified, that the whistle was blown and the bell rung, and another witness testified that he heard the bell ringing, and saw the engine pass; and this testimony was clear, positive and circumstantial, and uncontradicted, except by the testimony of the plaintiff,

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and another person near by at the time, who swore that they heard no bell or whistle; *Held*, that a verdict in favor of the plaintiff was not warranted by the evidence; and a new trial was granted.

A PPEAL from a judgment entered upon the verdict of a jury, and from an order denying a motion for a new trial. The action was brought to recover damages for a personal injury sustained by the plaintiff, as claimed, by being run against and knocked down by the defendants' locomotive, through the negligence of the defendants' servants, while the plaintiff was crossing the railroad track, in the city of Buffalo. The defendants set up, in their answer, as a defense, that the carelessness and negligence of the plaintiff contributed to, and caused, the accident.

The jury found a verdict in favor of the plaintiff, for \$5000. The facts, appearing on the trial, are stated in the opinion of the court.

J. C. Strong, for the plaintiff.

J. Ganson, for the defendant.

By the Court, E. DARWIN SMITH, J. None of the exceptions taken to the rulings or charge of the court, I think, are well taken. When the plaintiff rested, there was, I think, some evidence given by the plaintiff tending to make out a case for the jury, and the judge would hardly have been warranted in directing a nonsuit, though the evidence was weak and slight. At the close of the case, the motion for a nonsuit was renewed, and if it had been then granted, such ruling would not have been improper, and might have been sustained. But there is such contrariety of opinion among the judges, in respect to the propriety or expediency of granting nonsuits in this class of actions, that, I think, the learned judge might well hesitate to do so, and trust to the jury to dispose of the case in such manner as to obviate all question on this point, and save further litigation, as they clearly would have done,

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if they had found a verdict for the defendants. The instructions of the judge to the jury, so far as they are set out in the case, seem to me to have been entirely right. The requests to charge were rather efforts to divide the evidence, so as to make the court pass upon its detached parts as matters of law. I think the circuit judge properly refused to respond to these requests as asked.

But upon the merits, I am not satisfied with the verdict. I think it not warranted by the evidence. There is no pretense, or ground for pretense, that there was any negligence on the part of the defendants which could sustain the action, except in the omission of the engineer or person in charge of the defendants' locomotive to ring the bell, or sound the whistle at the crossing of Alabama street. When the plaintiff rested, it appears, from the evidence of the plaintiff himself, that he had heard no bell or whistle before he was struck by the engine, and another witness, at a short distance from the plaintiff when he was struck, also testified that he heard no bell. This is the slightest possible evidence, scarcely sufficient, uncontradicted, to take the case to the jury. At such a point, when trains were going out and running in, and bells ringing almost constantly, the ringing of a bell or sounding of a whistle would not be likely to attract any particular attention, and probably there were one hundred persons in Buffalo within the sound of the bell if rung, or within hearing of the whistle if sounded, who might have given the same testimony with equal truth.

The testimony on the defense, upon this point, of the engineer, on the contrary, that the whistle was blown and the bell rung, is positive and unqualified. He testified that he saw the flagman at the intersection of the road, and blew the whistle twice to attract his attention, and getting no motions from him to go on, he whistled again twice, and reversed the engine to stop; that the flagman then gave him the motion to come ahead; that he then did so, ringing the bell all of the time with his left hand; that the bell was rung all the

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way from where the witness started, and that the witness struck the plaintiff about 150 feet east of Alabama street. Another witness testified that he was at work in Kasson's shop, on the south side of the track, at the time of the accident, and close by the place where the plaintiff was struck; that he heard the bell ringing, looked out of the window which was open, saw the engine pass, and heard some one cry out, "bring an axe to cut my arm off;" that the witness ran out and saw the plaintiff opposite Kasson's office, and about 150 feet east of Alabama street; that the witness was expecting the one hundredth regiment that evening, and heard the bell ring, and went to the window to see. This was from ten to fifteen minutes past six, P. M., by city time. This witness further testified, that he was standing, when at work, about twenty feet from the defendants' track, and saw no other engine about there when he heard the bell ring. He saw the locomotive pass the window. That the engine went some one hundred and fifty feet from where the plaintiff was, before it stopped. The witness picked up the plaintiff some one hundred and fifty feet east of Alabama street.

The testimony of these two witnesses is clear, positive and circumstantial; they could not be mistaken. Their testimony is true, or they both committed willful and corrupt perjury. I think the jury, so far as any thing to the contrary appears in this case, were bound to give credit to their testimony. It was not contradicted; it was really no contradiction for the plaintiff to say he did not hear the whistle or bell. They were not impeached, or in any way discredited. The positive testimony of an unimpeached, uncontradicted, witness cannot be discredited, or disregarded arbitrarily or capriciously by court or jury. (*Lomer v. Meeker*, 25 N. Y. Rep. 363.)

If juries are permitted to discredit or disregard such testimony, there is no safety in the administration of justice, and parties might just as well let the result of a litigation abide the cast of a die, or a game of chance. It belongs to a jury, I admit, in considering the weight of evidence, to pass upon

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the credit due to the respective witnesses ; but this does not imply that they may, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted witness, who testifies fairly, and gives clear, rational, consistent and relevant testimony.

For judicial purposes, all witnesses stand upon a par, and must be believed in their testimony, unless discredited by the inconsistency, incredibility or improbabilities of their statements, on cross-examination, or otherwise contradicted by other witnesses, or impeached in respect to their general character for integrity or truth. Nothing of that kind was done or attempted in this case, and for aught that appears in this case, the two witnesses, Giles Hosmer and George Mercer, appear and stand as fair and as credible, in all respects, as witnesses, as any men in Buffalo.

The testimony, besides, tends to show that the plaintiff was struck by the engine in attempting to cross the defendants' track about 150 feet east of Alabama street. If so, he was where he had no right to be, and, as the judge instructed the jury, would not in such case be entitled to recover.

Upon the whole, I think, there should be a new trial ; but as it is upon the ground that the jury have found against the defendants upon the evidence, it must be upon the payment of costs by the defendants of the former trial, and the costs of the appeal to abide the event of the action.

New trial granted.

[ERIE GENERAL TERM, September 2, 1867. *Daniels, Marvin* and *E. D. Smith*, Justices.]

NEWMAN and others *vs.* ALVORD & BAILEY.

The plaintiffs were engaged in the business of manufacturing cement, or water-lime, from quarries or beds lying near Akron, Erie county, designated and sold as "Akron Cement," and "Akron Water Lime," the packages containing the same, when sold and offered for sale, having attached to each of them these words: "Newman's Akron Cement Co., Manufactured at Akron, N. Y. The Hydraulic Cement known as the Akron Water Lime." The defendants being engaged in manufacturing and selling a similar article from quarries or beds situated near Syracuse, Onondaga county, and knowing that water lime cement was manufactured and sold by the plaintiffs under the name of "Akron Water Lime," and "Akron Cement," called their own beds the "Onondaga Akron Cement and Water Lime," and after that, they sold the water lime and cement, prepared by them, with a label on each package, having these words upon it: "Alvord's Onondaga Akron Cement, or Water Lime, Manufactured at Syracuse, New York;" such water lime and cement being placed upon the market, and sold in the same places, where that manufactured by the plaintiffs was sold and used. *Held*, that the word "Akron," as used by the plaintiffs, was their trade-mark, by which they designated the article manufactured and sold by them; and that they were entitled to be protected in such use of it, by an injunction restraining the defendants from making use of the word "Akron" as their trade-mark.

Held, also, that the case was not one of such doubt as to require the plaintiffs' right to be first established at law.

Held, further, that to defeat the plaintiffs' right to appropriate the term "Akron," on the ground that it had previously been in common use, such a use of it must be shown as would extend to and include the defendants. That until that was done, the use made of it by the plaintiffs might well be exclusive of the defendants without being so as to the inhabitants of Akron.

THE plaintiffs, in this action, are manufacturers of cement, or water lime, at the village of Akron, in the county of Erie. And the defendants are engaged in the same business at Syracuse, in the state of New York. Two of the plaintiffs have carried on the business at Akron, for about thirteen years preceding the trial of this action, and they, together with the other two plaintiffs, have carried on the same business for three years preceding such trial. During all that time their cement, or water lime, has had an extensive sale at Buffalo and other places, in the country, bringing a high price, and being regarded as a superior article. The cement, or water lime, manufactured by them, has been designated

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and sold, during all the time of its manufacture, as "Akron Cement," and "Akron Water Lime." And the packages containing the cement, sold and offered for sale, had attached to each of them a label having the following words upon it :

"Newman's Akron Cement Co. Manufactured at Akron, N. Y. The Hydraulic Cement, known as the Akron Water Lime."

The defendants, Earle B. Alvord, Alvord & Bailey, and the defendants under the name of E. B. Alvord & Co., had been engaged in the manufacture and sale of cement, or water lime, for eleven or twelve years preceding the trial. The plaintiffs manufactured their cement from stone taken from quarries or beds lying between half a mile and a mile from the village of Akron. And the lime manufactured from such beds has been called "Akron Water Lime," or "Akron Cement," during all the time of its manufacture, both by the plaintiffs and their predecessors, and also by other persons manufacturing and selling the same. The defendants, and those previously engaged in the same business, manufactured their cement, or water lime, from quarries or beds situated near Syracuse, in Onondaga county. And from the time of the formation of the firm constituted by the defendants, on the first of January, 1866, they called these beds the "Onondaga Akron Cement and Water Lime," and after that, they sold the water lime and cement, prepared by them, with a label on each package containing it, having the following words upon it :

"Alvord's Onondaga Akron Cement, or Water Lime. Manufactured at Syracuse, New York."

At the time when the name was given to the defendants' lime beds, near Syracuse, they knew that the water lime cement was manufactured and sold by the plaintiffs under the name of "Akron Water Lime," or "Akron Cement." And that which the defendants manufactured was placed upon the market, and sold in the same places, where that manufactured by the plaintiffs was sold and used.

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There is but one process for manufacturing water lime cement, and that is, by burning and grinding the stone. Its quality and character depends upon the stone, or beds, from which it may be made. No place in the state of New York, except this village, in the county of Erie, is called by the name of "Akron."

Upon these facts, the court before which the action was tried, found and decided that the word "Akron," as used by the plaintiffs, was their trade-mark, by which they designated the article manufactured and sold by them; and that they were entitled to be protected in such use of it. And that the defendants had adopted it for the purpose of increasing their own sales, availing themselves of the reputation acquired by the water lime manufactured by the plaintiffs, and to secure to themselves a higher price for the article manufactured by them. Judgment was directed perpetually enjoining the defendants from using the word "Akron" on their bills and labels, or in any other way in connection with their business of manufacturing or selling cement or water lime, or in furnishing the same for sale; or in designating their quarry or mill. The defendants excepted to the decision of the court; and from the judgment entered upon it, brought the present appeal.

George N. Kennedy, for the appellant.

John Ganson, for the respondent.

By the Court, DANIELS, J. The name which has been selected and used for the purpose of distinguishing the water lime cement manufactured by the plaintiffs from that manufactured by others engaged in the same business, is one which is very clearly adapted to that purpose; because it designates the origin of the article made and dealt in by them, as well as its place of manufacture. Within the settled rule of the law governing trade marks, it was appropriately used in these

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respects ; for the material used by the plaintiffs was obtained and manufactured into water lime cement at the village having that name. To that extent they are within the protection of the principle sustained by all the cases decided on this subject. (*Stokes v. Landgraff*, 17 Barb. 608. *Corwin v. Daley*, 7 Bosw. 222. *Fetridge v. Wells*, 4 Abb. Pr. 144. *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. 599. *Clark v. Clark*, 25 Barb. 79.)

But the more important question arising upon the facts in this case is whether the plaintiffs can properly be protected in their use of that word, under the settled rules of law relating to the appropriation and use of words as trade marks. Where words, or names, are in common use, the law does not permit such an appropriation of them to be made, so far as they are comprehended by such use. And for that reason, words and names having a known or established signification cannot, within the limits of such signification, be exclusively appropriated to the advancement of the business purposes of any particular individual, firm or company. The inability to make such appropriation of them arises out of the circumstance that on account of their general or popular use, every individual in the community has an equal right to use them ; and that right is, in all cases, paramount to the rights and interests of any one person, firm or company. What may alike be claimed and used by all, cannot be exclusively appropriated to advance the interests of any person. Numerous cases have been before the courts in which this limitation upon the use of words and names as trade marks has been maintained and established. And no good reason can be given for questioning or impeaching their conclusions. But while this limitation is entirely reasonable there can be no propriety in extending it beyond the circumstance upon which it is founded. And accordingly any member of the community whose interests and business may be promoted by doing so, should be at liberty to apply even names and words in common use to the products of his industry, in such a man-

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ner as to indicate their origin or particular manufacture, where such application will not intrench upon and be in no way included in their use by the public. By doing so, the rights of no member of the community can be in any manner infringed, and no public inconvenience whatever can be occasioned by it. The public will still be left at full liberty to use such words or terms as they were used before ; while for a special purpose, a new office or purpose may be imposed upon them. In cases of that description no greater inconvenience or embarrassment can be found in protecting parties in the enjoyment of the new use or purpose engrafted upon a popular term than has been found in extending that protection to the case of a word created for the occasion, which was done in the case of *Burnett v. Phalon*, (9 *Bosw.* 192.)

The cases which have sometimes been supposed to come in conflict with this use and appropriation of popular terms will be found, upon examination not to be so. In those of *Burgess v. Burgess*, (17 *Eng. Law and Eq.* 257,) and *Wolf v. Goulard*, (18 *How. Pr.* 64,) the popular use and signification of the terms used was attempted to be appropriated, which, under the principles already adverted to, the court very properly held could not be done. Such also were the cases of *Corwin v. Daley*, (7 *Bosw.* 222,) where the plaintiff endeavored to appropriate the terms "Club House Gin," and of *Bininger v. Wattles*, (28 *How. Pr.* 206,) where the terms used were of a similar nature, being "Old London Dock Gin." These were terms in popular use for the particular purpose of describing the subjects the plaintiffs claimed the right to specifically appropriate them to. But neither of these decisions nor any others which they refer to, sanction the conclusion that because a term is in popular use, it can be burdened with no new one of a special and exclusive character for the purpose of identifying the trade and manufactures of a particular individual. What has been said by the courts upon this subject will be found to relate to such uses of pop-

ular terms as are properly included within their usual and appropriate public meaning.

The object of the law, in cases of this description, is to restrain and prevent fraud upon the manufacturer, and imposition upon the public. And that object would be entirely defeated, in many cases, if courts of justice were bound to withhold their protection from persons who imposed a new office and signification upon an old word for the purpose of rendering it serviceable as a trade mark. There is no more reason for allowing a person's business to be laid open to the fraudulent invasions and misrepresentations of competing manufacturers and dealers in such a case, than there would be where the term was entirely new and previously unused. Where one person by means of superior skill, intelligence and industry, has created a valuable trade for his goods or wares in the market, and identified such trade by the appropriate use of terms, labels or devices, the party who simulates those terms, labels or devices for the purpose of diverting or securing the trade to himself, is guilty of a double fraud upon the person creating the trade, and also upon the public. The man who goes upon the market in that manner, substantially represents that the goods or wares which he offers for sale are those of the person who first secured the public confidence for them. And the act embodies all the essential elements of fraud. Justice Duer says: "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another. And it is only when this false representation is directly or indirectly made, and only to the extent to which it is made, that a party who appeals to the justice of the court can have title to relief." (2 *Sandf.* 607.) And the same principle is stated by the chancellor in *Farina v. Silverlock*, (39 *Eng. Law and Eq.* 514.) The same learned justice, in the case already mentioned, perspicuously states the general rule applicable to cases of this description. He says: "Every manufacturer, and every merchant for whom

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goods are manufactured has an unquestionable right to distinguish the goods he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute as his may be the means of gaining. And the only limitation imposed upon him in doing so is, that he shall not "appropriate a sign or symbol which, from the nature of the fact which it is used to signify others may employ with equal truth, and therefore have an equal right to employ, for the same purpose," (2 *Sandf.* 605, 6 ;) which it is obvious could not be the case where the use made of a popular term was such as to devote it to a new office and purpose, and invest it with a new signification. These others could not employ it in the same manner with equal truth, nor with any semblance, even the most remote, to the truth. In that case, and to that extent, the use made of the word as a trade mark would not be obnoxious to the objection that it was an attempt to appropriate to a private purpose what already belonged to the public at large.

This appropriation or use of terms of a public nature, is sustained by well considered and well established authorities. In the case of *Knott v. Morgan*, (2 *Keen*, 213,) the plaintiff was a shareholder in a company having and running public omnibuses, with the title painted upon them of "London Conveyance Company," which was imitated by the defendants upon similar omnibuses used by them. And that imitation was restrained by injunction. In the course of his decision upon that case, Lord Langdale said: "It is not to be said that the plaintiffs have an exclusive right to the word "Conveyance Company," or "London Conveyance Company," or any other words. But they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices, which they have taken for the purpose of distinguishing their property, and thereby

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depriving them of the fair profits of their business, by attracting custom on the false representation that omnibusses owned by the defendants, belong to, and are under the management of, the plaintiff." And in that case an injunction was issued which restrained the defendants from using those terms, or any other names, words or devices painted, stamped, printed or written on their omnibuses in such a manner as to form or be a colorable imitation of the names, words and devices used by the plaintiffs. And on appeal, this decision was affirmed. The same doctrine was again declared by the same learned judge, in the case of *Croft v. Day*, (7 *Beav.* 74.) He there stated the law to be that "the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name or form of words. His right is to be protected against fraud, and fraud may be practised by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany its use with such other circumstances as to effect a fraud upon others." Which is approvingly cited by ROBERTSON, Justice, in *Corwin v. Daly*, (7 *Bosw.* 227,) and by the vice-chancellor, in *Collins v. Cowen*, (3 *Kay & John.* 428.) And the case of *Howard v. Henriques*, (3 *Sandf.* 727,) sustains and maintains the same conclusion. In the case of *Williams v. Johnson*, (2 *Bosw.* 1,) the court seemed inclined, rather hesitatingly, to hold that the plaintiff should be protected in the use of the appellation of "Genuine Yankee Soap." But in the case of *Williams v. Spence*, (25 *How. Pr.* 366,) full protection by injunction appears to have been awarded for it. In *Taylor v. Carpenter*, (11 *Paige*, 292,) the terms which the plaintiff had selected and used to distinguish his manufacture of thread from that of others, were "Taylor's Persian Thread," and he was protected in such use and appropriation by an injunction against a similar use of them by the defendant. And the decree awarding that injunction was affirmed by the Court of Errors. (2 *Sandf. Ch.*

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603.) This certainly should be a sufficient authority for the appropriation of well known terms to the purposes of manufacture and trade, and for the protection of it by injunction ; where the appropriation consists in affixing a new use, or office, or such terms no way disturbing or affecting the previous public use of them. Upon a similar state of facts, a bill was sustained in the United States Circuit Court, and Judge Story awarded an injunction of the same extended nature. (*Taylor v. Carpenter*, 3 *Story*, 458.) A similar bill was afterwards filed in the English Court of Chancery against a defendant whose name was Taylor, and that court restrained him from using the phrase "Taylor's Persian Thread," as descriptive of the thread he offered to the public and sold. (*Taylor v. Taylor*, 23 *Eng. Law and Eq.* 281.) And the same thing has been done where common terms have been combined with new devices, and the entire combination made use of as a trade-mark.

The cases of *Singleton v. Bolton*, (3 *Doug.* 293,) and *Milington v. Fox*, (3 *Mylne & Craig*, 338,) arose upon attempts made to acquire the exclusive use of popular names by which alone the articles compounded were known, and they have for that reason no application to the present controversy. In that respect they are something like the case of *Burgess v. Burgess*, *Corwin v. Daly*, and *Bininger v. Wattles*, *supra*, where the names claimed as trade-marks were the names by which the articles had been previously known in the market ; and in the two latter they indicated the quality only. The case of *Perry v. Puffit*, (6 *Beavan*, 66,) was disposed of upon the fact that the name used by the defendant was just as true in the application made of it by him as it was as used by the plaintiff ; while *Fetridge v. Wells*, (13 *How. Pr. R.* 385,) *Partridge v. Menck*, (2 *Barb. Ch.* 101,) and *Pidding v. Howe*, (8 *Sim.* 477,) were dismissed because the terms and phrases the plaintiffs endeavored to appropriate were not true, but on the other hand were unfounded and deceptive, and in no way

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related to the origin or manufacture of the articles to which they were applied.

In the present case, the term selected to identify and distinguish the plaintiffs' manufacture from those of a similar character placed upon the market by others had never been previously used for any such purpose. That use of it imposed a new attribute or office upon the word, which specially adapted it to indicate and distinguish the origin and place of the plaintiffs' manufacture. And it in no way intrenched upon any previous use or purpose to which the term had been in any way devoted by others. The term was made to bear and perform an entirely new duty, or office, which could result in no embarrassment, prejudice or injury to any other person whatsoever. And from the continued use made of it in that respect it has become an important and valuable element in promoting and securing the property and profit of the plaintiffs' business, and as such the defendants would be restrained from making a similar use of it.

It is not necessary, in disposing of the present controversy, to make it entirely dependent upon the considerations previously suggested. For the term appropriated to the business of the plaintiffs is not one of those which all alike are equally entitled to make use of. Its common use is not shown to have extended beyond the inhabitants of the village known by it. And neither of them appear to contest the plaintiffs' right to use it as a designation of the article they manufacture and sell. If any persons are entitled to complain of the use made by the plaintiffs of the term, they, certainly, are the ones to do it; not the defendants, who are neither inhabitants of, nor interested in, any of the concerns of the village. The doctrine of the case of *The Brooklyn White Lead Company v. Masury*, (25 Barb. 417,) does not aid the defendants, in this respect. For while it maintains the right of all the inhabitants of that particular place to call their white lead Brooklyn white lead, it does not hold that any person not an inhabitant of Brooklyn would have the same right.

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On the contrary, the principle adopted in that decision maintains the right as a common privilege appertaining to persons manufacturing white lead in the city of Brooklyn, and nothing whatever beyond that. If the conclusion of the court in that case is to be fully sustained, it will go no further than to entitle all persons manufacturing water lime cement at Akron to designate and describe it as Akron water lime, or Akron cement, which would in no way assist the defendants in their present defense. To defeat the plaintiffs' right to appropriate the term, on the ground that it has been in common use, such a use of it must be shown as will extend to and include the defendants. Until that is done, the use made of it by the plaintiffs may well be exclusive of the defendants without being so as to the inhabitants of the village of Akron.

The use of this word by the defendants, under the circumstances disclosed by the evidence, creates a very strong presumption that it was adopted for the purpose of diverting a portion of the plaintiffs' trade to themselves, and in that way securing the gains and profits which justly the plaintiffs are entitled to. No other reason appears to exist for applying the name of "Akron" to their lime beds and incorporating it in the labels placed upon the barrels in which the sale of their cement is offered and made. No circumstance can be reasonably and fairly suggested for these changes in the defendants' business which were not made before the 1st of January, 1866, although the same business had been carried on for many years before that, unless it be the one already mentioned. And the defendants should not now be permitted to successfully allege that they did not intend, by doing so, to mislead or deceive the public; nor that the public could not well be deceived by what they have done. There is no room for doubt but that this name was used by them to enable them to avail themselves of the patronage they suspected might otherwise go to the plaintiffs; and they probably correctly judged that such would be the result. The

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law would certainly be in fault if it should allow that to be secured, by the means resorted to in this instance. The case, in this respect, is directly within the conclusion of Judge Duer in *Amoskeag Manf. Co. v. Spear*, (2 Sandf. 607,) where he says: "It is evident, however, that in order to convey a false impression to the mind of the public as the true origin of the manufacture of goods, it is not to necessary that the imitation of an original trade mark shall be exact, or perfect. It may be limited or partial. It may embrace variations that a comparison with the original would instantly disclose. Yet a semblance may still exist that was designed to mislead the public, and the effect intended may have been produced. Nor can it be doubted that whenever this design is apparent, and this effect has followed, an injunction may rightfully be issued, and ought to be issued." The case is not one of such doubt as to require the plaintiffs' right to be first established, at law, within the rule applied to cases of doubtful character. (*Partridge v. Menck*, 2 Barb. Ch. 103.) The plaintiffs' right to restrain the defendants from making use of the word "Akron" as their trade mark is reasonably plain, and the judgment awarding the injunction should therefore be affirmed.

[ERIE GENERAL TERM, September 2, 1867. *Marvin, Daniels and E. Darwin Smith*, Justices.]

JOHN F. BUSH vs. JOHN TILLEY and JAMES TILLEY.

If a written contract, by reason of any mistake of fact, does not express the agreement, in fact, a court of equity may reform and correct it by decree, in a direct action for that purpose; but it cannot be changed or reformed by parol evidence, in an action at law arising upon an alleged breach of such contract, in which the plaintiff seeks to recover damages only.

If an alleged previous oral arrangement is declared upon, as the subsisting agreement, the subsequent written agreement duly executed, the moment it is presented in evidence, destroys the oral one, and takes away its character

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as an agreement, entirely; and no amount of parol evidence can give it force or vitality, as against the written version. The written version must be changed, or the contract must stand and be performed as first written.

Where the cause of action alleged is the breach of a subsisting contract between the parties, and the relief asked is a judgment for the amount of damages sustained, leave to amend the complaint, so as to convert the action into one of equitable cognizance, to reform a written agreement, should not be granted, on the trial.

THE complaint in this case alleged that on the 22d day of December, 1858, the defendants were copartners together, doing business at West Troy, in the state of New York. That on that day the defendants, under the name of John Tilley & Son, for value received, agreed to pay the plaintiff the sum of \$300, payable in barrel or half barrel heads (to be good merchantable heads;) the barrel heads to be six cents each barrel, and the half barrel heads five cents each half barrel, (the words "barrel" and "half barrel" having been omitted from the memorandum of the agreement by mistake.) The said heads to be packed in good flour barrels at thirty-six cents each, and half barrels at twenty-eight cents each, and delivered, when called for, at West Troy, giving a reasonable notice. The plaintiff further alleged that he did repeatedly call on the defendants at West Troy, and demand the said heads, and gave a reasonable notice, to wit, three months, to deliver the same, and the defendants refused to deliver more than one half the quantity above stated. That the defendants have since, and at all times, refused to pay said sum, or to deliver heads therefor, except for one half the quantity, as above specified, which they have delivered, and amounting to the sum of \$150. Wherefore the plaintiff demanded judgment against the defendants for \$150 and interest thereon from June 1, 1859, besides costs. The defendants by their answer admitted that they were copartners as in the complaint alleged, and denied each and every other allegation in said complaint contained, except as hereinafter admitted. For a second, further and separate answer, the defendants stated that on or about the 22d day of De-

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cember, 1858, for the purpose of settling certain matters of difference between the plaintiff and the defendants in an amicable manner, and without any other consideration therefor, the defendants agreed to deliver to the plaintiff barrel heads or half barrel heads, at the option of the defendants, to the amount of \$300, at the price to be allowed the defendants of six cents for each head of the barrel heads, and at the price of five cents for each head of the half barrel heads; such heads to be packed in good flour barrels, at the price to be allowed the defendants, of thirty-six cents each barrel, or half barrels at the price of twenty-eight cents each half barrel to be delivered. That upon the plaintiff's request therefor, the defendants did deliver to said plaintiff, in the year 1859, and before the 1st day of August, in that year, 4505 barrel heads, packed and delivered in eighty-eight barrels accompanying, and delivered with the same, and amounting in all, barrel heads and barrels, to the sum of \$301.98, at the price at which the said heads and barrels were so as aforesaid agreed to be delivered, and which were received by said plaintiff, or his agent, upon such delivery and upon said contract, and were in full satisfaction of said contract. And the defendants denied that they ever agreed to deliver any barrel heads, or half barrel heads, to said plaintiff upon the terms and at the prices stated in the complaint, or any other terms than those above specified; and they expressly denied that there was any thing due to said plaintiff for or on account of the matters stated in said complaint. The defendants admitted that the plaintiff, since the delivery by the defendants of the heads and barrels so as aforesaid delivered, had requested from said defendants a further delivery of heads under such contract; which delivery the defendants had refused to make, inasmuch as they had, before such request, fully done and performed all that, under and by said contract or agreement, they undertook or agreed to do or perform. And the defendants alleged that the agreement hereinbefore stated, was the same agreement referred to in the complaint; that the said

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agreement was in writing, and that such written agreement, signed by the defendants, and delivered to the plaintiff, correctly and truly states the agreement between said plaintiff and the defendants, and that there was no omission, by mistake or otherwise, of any of the matters alleged in said complaint to have been thus omitted ; and the defendants alleged that no such matters ever entered into or formed a part of said agreement.

The cause came on for trial at a circuit court held at the city of Rochester, by and before Hon. E. D. SMITH, justice, and a jury, on the 8th day of October, 1866. The counsel for the plaintiff opened the case to the jury, and stated that he would prove the facts substantially as alleged in the complaint. The counsel for the defendants then stated to the court, that upon the opening of the counsel for the plaintiff he moved for a nonsuit. The court thereupon decided that this was an action at law. That on the trial of such action before a jury, the plaintiff could not go beyond the written contract ; that it was the province of a court of equity alone to reform a contract. That the reformation of this contract was not demanded in the complaint, to entitle the plaintiff to such reformation. The counsel for the plaintiff duly excepted to this decision. The counsel for the plaintiff then asked leave to amend the complaint so as to demand equitable relief. The court refused to allow the amendment on the trial at the circuit, but offered to allow the plaintiff to make such motion at special term upon a proper case made ; and the counsel for the plaintiff duly excepted. It was admitted that the trial of the cause was commenced at a former circuit, and on the opening thereof, the same questions were raised as now, but were not disposed of, for the reason that the court adjourned, and that it had been noticed for trial at the present circuit by both parties. The counsel for the plaintiff then asked leave to read the written contract in evidence, being the same set out in the complaint. The court allowed this to be done, and the contract was read in evidence. The

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counsel for the plaintiff then offered to show that by the oral contract between the plaintiff and defendants, the price of barrel heads was to be six cents each barrel, and the price of half barrel heads five cents each half barrel; and that the words "barrel" and "half barrel" were omitted from the written memorandum by mistake. The counsel for the defendants objected, and the court excluded the evidence, and the counsel for the plaintiff excepted. The counsel for the plaintiff then offered to show by stove dealers and coopers that barrel heads were invariably sold by the pair, and that whenever the price of barrel heads is stated at so much each, the meaning is each pair or each barrel. The counsel for the defendants objected, and the evidence was excluded, and the counsel for the plaintiff excepted. The counsel for the plaintiff then offered to prove that at the time of the contract the market price of barrel heads was six cents each barrel, and of half barrel heads five cents each half barrel, and that the defendants had delivered upon the contract \$150 worth only of heading at that price, and had refused to deliver any more. The counsel for the defendants objected to the evidence, and the same was excluded, and the counsel for the plaintiff excepted. The court then nonsuited the plaintiff, with liberty to him to apply, at special term, for leave to amend his complaint; and the plaintiff's counsel excepted. The court granted thirty days' time to make a case, and ordered the exceptions to be heard in the first instance at a general term.

J. C. Cochrane, for the plaintiff.

Benedict & Martindale, for the defendants.

By the Court, JOHNSON, J. The plaintiff was very properly nonsuited upon the trial. His contract, which was in writing, when he came to introduce it in evidence, was wholly different from the one set forth in the complaint, and only entitled him to one half the quantity of barrel heads

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which he claimed, and which one half, he admitted in the complaint had been delivered by the defendants, and received by him. It was clear, therefore, upon his own showing, that he had no cause of action. The contract had not been broken, as he had alleged in his complaint, but had been performed by the defendants. The plaintiff's offer to prove by parol, that it was agreed orally between the parties, before the agreement was reduced to writing, that the price of barrel heads should be six cents each barrel, and of half-barrel heads five cents each half-barrel, and that the words barrel and half-barrels had been omitted by mistake from the writing, was properly rejected. To have allowed it would have been a violation of one of the plainest rules of evidence. The writing was the highest evidence, of what the contract subsisting between the parties actually was, and the proposition was to change it and make it a different contract by inferior evidence. All the rules of evidence, both in law and equity, are in favor of the ruling of the court, on the question presented. It would be idle to cite authorities in support of such a proposition. The other parol evidence offered, to explain, and vary, the written contract, was properly excluded. The contract between the parties, as is apparent, was to be in writing, and was reduced to writing accordingly. Until this contract was altered by the consent of all the parties thereto, or reformed by judicial sentence, there was no other contract subsisting between them than the one thus written. The previous oral negotiations, or stipulations, were all merged in the writing, and did not stand for the agreement, or for any agreement between the parties. If the writing, by reason of any mistake of fact, did not express the agreement, in full, a court of equity might reform and correct it by decree, in a direct action for that purpose; but it is impossible to change or reform it by parol evidence, in a mere action at law, arising upon an alleged breach of such contract, and seeking to recover damages only. If the alleged previous oral arrange-

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ment is declared upon, as the subsisting agreement, as is sought to be done here, the subsequent written agreement duly executed, the moment it is presented in evidence, destroys the oral one and takes away its character as an agreement, entirely ; and no amount of parol evidence can give it force or vitality, as against the written version. The written version must be changed, or the contract must stand and be performed as first written. A written contract cannot be thus avoided, and rendered of no effect. The application of the plaintiff's counsel for leave to amend his complaint, upon the trial, so as to convert the action into one of equitable cognizance, to reform the written agreement, was properly denied. An amendment of that character would have changed the nature and cause of action, entirely. The cause of action alleged was the breach of a subsisting contract between the parties, to the injury of the plaintiff. And the relief asked was a judgment for the amount of damages sustained. Had the amendment been allowed, the cause of action would have been the occurrence or existence of a mistake, by means of which the written instrument failed to express fully the real agreement between the parties ; and the relief sought, in that case, would have been the reformation of the written instrument, so that it should express what the parties had agreed upon. As an incident to the main purpose, and gist of the action, the plaintiff might, according to the decisions of this state, had he succeed in the reformation, have recovered his damages also, if there had been a breach of such reformed contract. But the two actions are as essentially unlike as two actions well can be. The amendment would have changed substantially the claim as set out in the complaint. It was clearly, therefore, not a case for the amendment of the complaint at the trial, whatever might have been done upon a motion founded upon affidavit and notice. It is claimed by the plaintiff's counsel that the mistake was averred in the complaint and issue taken upon it in the answer, and that this was the only issue presented by the pleadings ; and that there

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was error in refusing to try the issue thus presented. But no such allegation of fact was made in the complaint, in any sense which characterizes the statement of a fact, in a complaint, constituting a cause of action. All that is said on the subject is thrown in by way of parenthesis for the mere purpose, like all other parenthetical sentences, of qualifying or explaining, the sense of the principal statement of fact. To call such an insertion in a pleading, a statement, or averment of a fact, constituting a cause of action, is to ignore or confound all ideas of premises and conclusions which belong to all pleadings, in all actions. If this were allowable, there could be no system or certainty in complaints and answers, and courts would be left to uncertainty and endless speculation as to what was presented for trial.

The cause of action which the facts, as stated, constituted was very plain; and was not sustained by the evidence. The nonsuit was therefore proper, and a new trial should be denied.

[MONROE GENERAL TERM, September 2, 1867. *J. C. Smith, Welles and Johnson, Justices.*]

LEWIS and COBB vs. GREIDER, survivor, &c.

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One purchasing property for others merely as their agent, and depending for the measure of his compensation upon the amount of profits realized by his principals from the transaction, is not a partner with them in the property so purchased.

And, although interested in the amount which may be recovered in an action brought by his principals against purchasers, to recover damages for a breach of their contract to buy such property, not being a part owner of the property, he need not be joined as a plaintiff therein.

The refusal of purchasers either to pay the money, give security, or do any other act in fulfillment of the contract, gives to the vendors the right to sell the property on the purchasers' account, and to hold them responsible for a deficit in the price.

It is not necessary, in such a case, for the vendors to give the vendees notice

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either of the time or place of sale. General notice of their intention to sell is sufficient.

The law, in such a case, constitutes the vendor in possession of the goods the agent of the vendee, for the purpose of such sale. As such agent, he must act in good faith, and take proper measures to secure as fair and favorable a sale as possible.

Vendors are not restricted, under such circumstances, as respects the place of sale, to the place of *delivery* of the property named in the contract, nor to a time necessary for reasonable notice, after the right to sell accrues; but if the property cannot readily be sold at the place of delivery fixed by the contract, or a better and more advantageous sale can be effected elsewhere, it is the duty of the vendor to go where he can get the best price and readiest sale, not out of the usual course and channels of trade in marketing such property. Such sale should be within a reasonable time.

The presumption is that a referee did not overlook the terms of a memorandum of sale, or fail to consider it as it stood at the time of the trial in weighing the evidence upon a disputed question of fact. It is for the party complaining of the report to show clearly that such a mistake has occurred, before he can ask the court to act upon it.

A PPEAL by the defendant, from a judgment entered upon the report of a referee.

The action was brought by the plaintiffs against the defendant and Samuel R. Bear, as copartners in business, to recover of them damages for their breach of a contract to buy of the plaintiffs a quantity of barley. It was begun by the publication of summons and by attachment, the defendants being non-residents of this state, and the defendants appeared in the action by attorney. The issues formed by the pleadings in the action, were on the 13th of November, 1865, at the Ontario circuit, referred to the Hon. Addison Gardner, as sole referee, to hear and determine, and to render a judgment in the action. The action was tried before him and submitted to him with oral argument on the 13th of January, 1866. On the 27th of January, 1866, the referee made his report, by which he found:

That prior to, and on the 7th day of December, 1864, the plaintiffs were copartners, and since and hitherto have been partners in the business of buying wool, grain, &c. at Geneva, in this state; that the defendants, during the same

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period, were also copartners, doing business as maltsters in the town of Mount Joy, in the state of Pennsylvania; that on or about the day last aforesaid, the defendant Greider, in behalf of the copartnership of which he was a member as above mentioned, made with the plaintiffs the agreement for the purchase and sale of barley in the complaint stated and set forth; that during the negotiation preceding the making said agreement, Greider inquired of the plaintiffs whether they had samples of the barley at that time in the storehouse mentioned in the complaint; that he was informed by the plaintiffs that they had not; that they had not seen the barley, but that it was purchased in the neighborhood of the Seneca lake, a region noted for raising good barley, and they presumed this was good, and that the lot in store contained the usual proportion of two and four rowed barley; that the defendant on his way up the lake had better stop at the landing where the barley was stored and examine its quality; that \$3000 was paid by the defendants at that time upon said agreement, as stated in said complaint; that the plaintiffs, in pursuance of said contract, proceeded to purchase and did purchase and have in store at said landing, as early as the 5th of January, 1865, about 1700 bushels of barley in addition to the 3000 in store at the time of the making of said agreement as aforesaid; that early in the month last mentioned the plaintiffs wrote and mailed a letter to the defendants, addressed to the latter at their place of business, informing them of such purchase, but said letter was never received by the defendants or either of them; that subsequent to the making of said agreement, the plaintiffs delivered, and the defendants accepted, the quantity of barley mentioned in said complaint; that at the time of receiving said barley last mentioned, the defendants complained, and so wrote to the plaintiffs, that the said barley was unmerchantable, but they had finally concluded to receive it. That the plaintiffs, subsequent to the receipt of the letters last mentioned, wrote to the defendants to make with them an

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examination of the barley then in store at said ware-house, to the end that its quality might be ascertained before any further quantity should be shipped ; that in pursuance of such request the said Greider, one of the defendants, came to said landing, examined all the barley in store on that day, being the 6th of March, 1865, and after such inspection expressed himself satisfied with the quality of the same ; that on the 15th of March, in the year last aforesaid, the said Greider, in behalf of the defendants, applied to the plaintiffs and proposed, in lieu of money, to give the drafts of his firm on the National bank of Mount Joy aforesaid, for the price of the grain purchased by said defendants, the draft to run for three months, with interest from the first of the preceding month of February, and to be accepted by the cashier of said bank ; that this proposition was acceded to by the plaintiffs, but when the amount for which said drafts should be given was discussed between the parties, the defendants insisted that they should be given for \$3000 and interest as aforesaid, being the balance due upon the three thousand bushels of barley in the ware-house at the time of entering into said contract, the defendants claiming that they had purchased that quantity, and no more, and had never authorized the plaintiffs to buy two thousand bushels, or any other quantity whatever. The plaintiffs, on the other hand, insisted that the contract was in substance and effect as now stated in their complaint, and claimed that the drafts should include not only the balance upon the three thousand bushels as above mentioned, but the value of the barley subsequently purchased by them according to the price stipulated in said contract. The defendants denied the existence of any such agreement as that last mentioned, and declined either to pay money and give security, or do any other act in fulfillment of it ; that the plaintiffs then notified the defendants that they should proceed and sell the barley on hand and obtained and purchased under said contract for account of the defend-

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ants to the best advantage, and hold them responsible for the difference, if any, between the proceeds of such sale and the contract price of the same ; that the defendant Greider, in behalf of the defendants, forbid the plaintiffs to sell any barley of the said defendants, and the parties then separated. It was further proved that barley declined in price after the making of said contract, and that the said plaintiffs, after an unsuccessful attempt to sell the barley obtained under the said agreement and remaining in their hands after the 15th of March, as above mentioned, at Geneva, caused the same to be shipped to the city of New York, and there sold in the usual manner by a grain broker, for the best price that then could be obtained ; that the shipment and sale was made in good faith, for the purpose of disposing of the grain to the best advantage ; that the gross avails of the barley, as sold in New York, amounted to \$4622.38 ; that the freight, storage, commissions and other necessary expenses amounted to \$668.64, leaving the net avails applicable upon said contract \$3953.74 ; that the whole amount of barley purchased by the defendants under the contract of the 7th of December above mentioned, was four thousand six hundred and sixty-three bushels and twenty-six pounds, which, at \$2 per bushel, the contract price, would amount to \$9327.05. From this deduct the \$3000 paid by the defendants at the making of the agreement, and the balance would be \$6327.05. The interest on this balance from the 1st day of February, the time fixed by the parties for that purpose on the 15th March, as above mentioned, to the 27th of May, 1865, the time when the avails of the barley sold in New York came to the hands of the plaintiffs, is \$143.94, which added to the balance above mentioned, the aggregate would be \$6470.99 ; from which last sum deduct the net avails of the sale aforesaid, and the balance thus found, with interest to the date of the report, would be \$2634.70. It was further proved that John Coryell was employed by the plaintiffs to purchase grain, including that obtained under the foregoing contract ; that said plain-

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tiffs were to furnish the funds for such purchases, to be owners of the grain when bought, and dispose of the same exclusively, and the said Coryell for his services in the purchase of the same, was to receive one half the profits realized upon such sales.

The referee found as conclusions of law, from the facts above stated,

1st. That Coryell was not, in virtue of the arrangement above mentioned, a copartner with the plaintiffs in their business of purchasing and selling grain, nor had he any interest in the subject matter of this suit that required or authorized him to be made a party plaintiff.

2. That the notice given to the defendants by the plaintiffs of their intention as to the sale of the grain, and the application of the proceeds, as above set forth, was sufficient in law to authorize the sale made by them and the application of the proceeds upon the contract of the defendants.

3d. That the plaintiffs, after crediting the cash paid at the making of the agreement between these parties and the net avails of the barley sold and received by them on the 27th of May, 1865, were entitled to judgment for the balance remaining due according to said contract, with interest thereon to the date of the report.

From the judgment entered upon this report, the defendants appealed. After the service of notice of said appeal, the defendant Bear died, and the defendant Greider survived him.

Angus McDonald, for the appellants. I. The referee erred in deciding that the witness John Coryell "had no interest in the subject matter of this suit that required or authorized him to be made a party plaintiff." It clearly appears from the testimony that the barley purchased after December 7, (which is the barley in controversy,) was bought, all but one lot, for \$1.80, and that lot for \$1.85, and that the three thousand bushels bought before December 7, cost

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§2. Hence, as the sale of both was for \$2, and Coryell's interest or pay for buying was one half of the profits, his interest or pay depends entirely upon the decision whether the barley bought after December 7th was included in the contract of December 7th. And this was the exact question at issue between the parties before the referee. If the plaintiffs maintain their recovery against the defendants for \$2 per bushel, then Coryell will be entitled to one half of the difference between the cost price, (\$1.80, \$1.85,) and \$2; but if they do not, then he is not entitled to any thing, as the plaintiffs by their sales in New York *realized* less than \$1.80 net. Hence, 1. Coryell is *directly interested* in the result of this action, and should have been joined as co-plaintiff therein. (*Code*, § 117. *Secor v. Keller*, 4 *Duer*, 416. *Fowler v. Atlantic Ins. Co.*, 8 *Bosw.* 332.) 2. It is admitted that by his contract Coryell was not a partner of the plaintiffs as to *third* persons, but we submit that under his contract he had a right to make the plaintiffs' *account*, and hence in this regard might claim to be a partner as between themselves. 3. But it is not necessary that the party sought to be made a party to an action under section 117 of the Code, should be a *partner* either as to *third* persons, or even between themselves. It is enough in the words of the Code, "that he is *interested* in the subject of the action and in obtaining the relief demanded." Under the proof, Coryell clearly comes within this requirement, and hence the motion for nonsuit should have been granted and the judgment must be reversed.

II. In the printed case the court will find, "It is agreed that the memorandum in the defendant's diary, dated December 7, 1864, shall be shown to the court on argument as it therein appears." This memorandum, as is certified by the referee, "was produced in evidence on the trial as it now appears." On the close examination of the memorandum, the court will see that at the end of the eighth line from the top the word "prime" is written in smaller handwriting, so that

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it reads, "Bought of Lewis & Cobb 3000 bushels prime barley at Lodi Landing." Now, by reference to the opinion of the referee, it will be seen that he had entirely overlooked the word "prime" and, what is more, has built up a portion of his argument and urged it against the defendant Greider, that the word "prime" was not in the memorandum. By the memorandum itself, certified by the referee, the referee admits his mistake, and thus not only entirely removes all foundation for his argument on the absence of any statement as to *quality* in the memorandum, but at the same time shows strong confirmatory evidence the fact that the word "prime" is in the memorandum would be to the evidence of Greider, that such was the contract. The referee declined to decide any thing on the testimony as it *in fact was*, having by mistake decided the case upon the evidence as *it was not*, and hence he simply certifies the evidence itself up to this court. But in such case we submit that the same rule should be applied as when the referee by mistake excludes *pertinent* testimony. If the court can see that such testimony, had it been admitted as it should have been, would properly have to be considered by the referee, they will not speculate as to the probable or possible effect it might or might not have had upon the mind of the referee, but will reverse the judgment and send the case back for a new trial. (*Union Bank v. Mott*, 39 Barb. 185.) So in this case, the referee has decided this action, and in his consideration and decision thereof has, *by mistake*, omitted to consider pertinent testimony, although he had admitted it. Hence in both cases the error arises from the same cause, the mistake of the referee. The consequence of the error is the same, viz: the unsuccessful party does not have the judgment of the referee upon *all* the *pertinent* evidence which he produced or offered to produce on the trial, and hence has not had a *fair* and *impartial* trial, and therefore the remedy should be the same, viz, a reversal of the judgment. That the evidence not considered was pertinent and should have been considered by him, is shown by

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his own opinion. We therefore submit that the judgment below should be reversed for this admitted error of the referee. If the court will examine the evidence in the case as to whether the contract was for *prime* barley, especially letters of dates of January 19 and January 24, of the defendants, and the plaintiffs' answer of January 27, in which the defendants repeatedly assert that the plaintiffs sold the grain as prime, and the plaintiffs impliedly admit it ; and more especially, as the other questions of fact were very close, and are all connected together and depend entirely upon the *credibility* of the parties, we submit it must come to the conclusion that the only safe way is to adopt the rule laid down in *The Union Bank v. Mott*, (39 Barb. 185.)

III. The referee erred in his second conclusion of law, viz : "That the notice given to the defendant by the plaintiffs of their intention as to the sale of the grain and the application of the proceeds as above set forth, was *sufficient in law to authorize the sale made by them*, and the application of the proceeds upon the contract of the firm of which the defendant is survivor. The third conclusion of law of the referee is founded entirely upon the second, and hence if the second is not sound, the third must fail also. The question at issue is, under all the circumstances of this case, what is *the true measure of damages* ; the *usual* one of the difference between the contract price and the market price, on the day of the breach, or the one allowed by the referee, viz. the difference between the net avails of the sale in New York, May 16th, and the contract price. The breach of the contract was on the 15th day of March. On that day the market price of barley at the place of delivery was \$1.90. The contract price was \$2. The whole amount of grain purchased by the defendants of the plaintiffs was 4663 bushels and 26 pounds. Of this amount 724 bushels had been delivered, and the balance remaining in the hands of the plaintiffs March 15th, 1865, was 3939 bushels and 26 pounds. On December 7th the defendants paid the plaintiffs on the contract \$3000.

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Hence if the first and ordinary rule of damages were adopted, the loss on the grain on hand, 3939 bushels and 26 pounds at 10 cents per bushel, difference between \$2 contract price and \$1.90 market price, would be \$393.95. The interest on balance of purchase money from February 1st to March 15th, would be \$55.36, making \$449.31. But the plaintiffs had received \$3000. They had delivered 724 bushels, which, at \$2, would be \$1448, leaving still in the hands of the plaintiffs \$1552 to be applied on purchase price or loss of barley not delivered. But, as we have shown, the loss and interest according to this mode of measuring damages, would only be \$449.31, and hence if this rule of damages is right, the *defendants would be entitled to a judgment against the plaintiffs* for the difference between \$1542 money on hand, less the loss and interest \$449.31, which is \$1102.69 besides costs. Under the rule adopted by the referee, he has ordered judgment against the defendants for \$2634.20 damages, and \$344.20 costs. So that the difference between the two rules would be \$2634.20 plus \$1102.69, which amounts to \$3736.89, and if the defendants had recovered judgment, and their costs had equalled the plaintiffs', there must be added to this, double the costs of the plaintiffs, viz, \$688.40, which would make the difference in all \$4425.29. Hence, besides being an important question in itself as to what is the true rule of damages in such cases, in this case alone its decision involves the amount of \$4425.29.

1. The usual and ordinary rule of damages in the case of a refusal of a vendee to receive personal property sold to him, when the vendor has not kept the property for the vendee, but has disposed of the same, is the difference between the contract price and the market price on the day of the breach at the place of delivery. (*Chitty on Cont.* 430, 431. *Dana v. Fiedler*, 12 *N. Y. Rep.* 40. *Hamilton v. McPherson*, 28 *id.* 76.) This is the only rule ever established in such cases, and to it there are but two exceptions that have been allowed from the supposed necessity of the case: (1.) Where

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there is *no market price* at the place of delivery, then you are allowed to prove the price at the *nearest market* and calculate the market price at the place of delivery from that. (2.) In cases where the property sold is *perishable*, and in some other cases (hereafter more particularly stated) under certain regulations and notice to the vendee, the vendor is permitted to sell the property *as the property of the vendee*, and recover of the vendee the difference between the contract price and the *net* avails of such sale. The plaintiffs have recovered under the second exception, but in order to warrant such recovery or the affirmance thereof, the court should see that the plaintiffs bring their case *clearly* within the exception. Such is the uniform rule. If a party claims under an exception to any *uniform, well established* rule, he must bring his case clearly within the exception. In all doubtful cases the rule will prevail.

2. The right claimed by the plaintiffs to sell the property of the defendants, or rather the right of the vendor to sell the property of the vendee, as his quasi agent, was first established in cases of perishable property; afterwards it was extended to other cases. But the only ground on which it has ever been sustained, is that the vendor may get the advantage of *his lien on the property for the purchase money*, and as the court says in *Sands v. Taylor*, (5 John. 409,) "The defendants being bound by the contract to receive and pay for the whole cargo, and having refused to do either, what were the plaintiffs to do? The article was perishable, and the interest of all parties required that the most should be made of it. Nothing, therefore, is more reasonable than that the plaintiffs, who were not bound to store or purchase the wheat, should be permitted to sell it at the best price that could be obtained." And in all cases where the property is not perishable, the only ground we find stated in the books is stated in *McLean v. Dunn*, (4 Bing. 728,) where the court says, speaking of a sale, "but if articles are not perishable, price is." Hence, as any implied agency must be restricted

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closely to the objects for which it is allowed and authorized (as it is against the will of the principal,) any sale under this exception from the general rule can only be authorized when it is so made as to accomplish the objects of the agency in such case, viz: to protect and make available the lien of the vendor for purchase money, by allowing him to sell and realize, and thus avoid any loss either from the perishable nature of the property, or the possible, if not probable, decrease in price. We therefore submit, that in case any vendor elect to sell the property of his vendee for the purpose of realizing from his lien thereon for the purchase money, he must do so by an immediate sale, or a sale as soon as it can be made, of the property in the usual mode in the market where it was to be delivered, and thus realize immediately the best market price. After he has given the proper notice to the vendee of his intention to sell, and thus elected to realize, he must proceed forthwith to do so, according to his notice, and the vendor is not at liberty for any reason (if there is any market at the place of delivery, as there was in this case,) to exercise any discretion, either in delaying the sale or, much less, in transporting the grain to any distant place under the belief that a better price might thus be obtained. In short, all the exception amounts to, and all the law allows, is that the vendor, instead of recovering at the trial the difference between the contract price and the market price, as shown by the opinion of witnesses, is allowed to recover the difference between the contract price and the market price, as proven by an actual trial or sale of the identical article in market at the place of delivery, and on the day of the breach or election of the vendor, or as soon thereafter as was practicable. It is thus the application of the ordinary rule, with the substitution of an actual trial as proof of market value instead of the ordinary mode by the opinion of witnesses. Again, at the time of the sale, (while the action is pending,) although the vendor claims to sell as agent, yet it is then undetermined whether he is selling as agent or principal. In this case, at the time of the

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sale it was not decided whether the contract was for 3000 or 5000 bushels. If the first, the plaintiffs sold as principals ; if the latter, as agents. The sale is of property, the title to which is in controversy under a claim as to title, which claim is afterwards decided to be well founded. These being the circumstances under which the sale is made, the limits of the implied agency should be so fixed as to preserve the rights of all parties. As long as the suit is pending the defendants will not and cannot acknowledge that *they own* all the grain, and hence they do not consent or authorize any thing. So that all authority, as we have said before, comes from the *necessities* of the case in order to protect the assumed rights of the vendor, afterwards decided to be real. As to the vendor, he claims to sell as agent, but if the suit should be decided against him he will really have sold as principal and owner of the grain. A sale under such circumstances, should be so conducted as to preserve the *rights of each party* equally. If conducted as we have claimed, then the vendor will obtain all *his legal rights* with as little violation of the rights of the vendee as may be. If the vendor be allowed to exercise *his discretion* as to *when* to sell as well as *where* to sell, then, although he sells as an implied agent, he exercises all the rights and powers of *principal*. The vendor therefore loses nothing whichever way the suit is afterwards decided, as in making the sale, although he claims to sell as an *implied* agent, he really exercises over the grain, all the rights and powers of principal, to the injury of the rights of the vendee, (as afterwards decided,) as we shall hereafter show.

A short review of the decisions will show that this view of the case is sustained. (The counsel here reviewed and commented on the following authorities : *McLean v. Dunn*, 4 *Bing.* 728 ; 3 *Par. on Cont.* 209 ; *Girard v. Tygart*, 5 *Serg. & R.* 32 ; *Buffington v. Quantine*, 15 *Penn. R.* 310 ; *Sands v. Taylor*, 5 *John.* 395 ; *Bement v. Smith*, 15 *Wend.* 493 ; *Crooks v. Moore*, 1 *Sandf.* 297 ; *Pollen v. LeRoy*, 30 *N. Y. Rep.* 551.) From this brief review of the authorities, it is

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submitted that it is established and appears, 1st. That each case shows that the sale in that case was at the place of delivery, and as soon as might be after notice of election. 2d. That in every case but one or two, the notices of sale specified *the time and place of sale*, and several of the cases hold that to be absolutely necessary. 3d. That the only foundation on which this right of sale rests, is that the vendee may realize from his lien for purchase price, in order that he may not lose the value of his lien by the loss of the property, if it be perishable, or, if it be not perishable, then by its depreciation in price. 4th. That in no case is there any proof of damages except this resale, or no proof that shows that the resale was for less than the market price. 5th. That the proof of resale, and the avails thereof, is only a mode of proving the actual damages, and that either party is at liberty to give any more just evidence of damages, and in such case the court, or jury, should adopt that. And we say, inferentially, it is equally and clearly established by the uniform practice, as evidenced in *every case in the books*. 6th. That such resale must be *at the place of delivery, and as soon as may be after due notice of intention to sell*. 7th. That such sale is *but a way of ascertaining* the market value on the day of the breach, at the place of delivery, as decided in *Pollen v. LeRoy*, (30 N. Y. Rep. 551,) and unless so conducted as to ascertain that, it is not warranted as a sale for the vendee, but becomes a sale as owner, and the vendor thereby rescinds the contract, and can only recover damages according to the ordinary rule. 8th. That the sale must be made by the vendor *as agent*, and not as *principal*.

3. The sale made by the plaintiffs in the case at bar, was not in accordance with the rules thus established, because there was no notice of the time and place of sale. (*Greaves v. Ashlin*, 6 Modern, 162. *McEchron v. Bandles*, 34 Barb. 301. *Mallory v. Lord*, 29 id. 454.)

4. The sale made by the plaintiffs, as stated in the facts found, is entirely inconsistent with the rules established to

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govern such resales, as hereinbefore stated; because the sale made was not within a reasonable time after the notice, and was made at a place far distant from the place of delivery. The case shows that there was a market at the place of delivery on the day of the breach, (viz. \$1.90,) and although the case states that the market was dull, and the plaintiffs could not make sales *favorable, in their opinion*, yet that was no excuse to them. The case also shows that they had in their hands over \$1496 over and above the price of the 724 bushels of grain delivered and interest, so that there being less than 4000 bushels on hand, the plaintiffs could have sold the grain at 35 cents below the contract price, or 25 cents below the market price, and realized all due them *on the contract*. They could at least have done this, on a very dull market, to enforce their lien for purchase money, which is the only ground for the resale. They could have made the sale at the place of delivery, soon after the breach, with perfect safety to themselves. Hence, there was no excuse for delay. But by removing the property to New York, and selling it there, the plaintiffs clearly exercised ownership over the property not consistent with the rights of the defendants, and not authorized by their quasi agency, and hence they thus *rescinded* their contract, and can only recover damages according to the ordinary rule. (1st.) No case can be found in the books in which any *resale* was ever made elsewhere than at the place of delivery, and hence the sale in this case was not according to usage or custom of trade. For this reason, according to all the authorities, it is void. (2d.) By the notice given, the defendant had no right to expect that a sale would be made at any other time than soon after *the notice*, and much less at any other place. Knowing the market, he may have concluded to let them sell, as he would still have his rights in the suit, and, if beaten, he knew what the damages would be. Hence, the damages recovered cannot be sustained, as it was not expected by the parties at the time of the breach, and they do not necessarily

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arise therefrom. (3d.) At any time while the plaintiffs held the barley, the defendants had the right to come and take it at the place of delivery, on payment of the balance of the purchase money. This right was entirely destroyed by the plaintiffs removing and transporting the property to New York city, especially without giving any notice of it to the defendants. Hence, this removal was entirely unauthorized. (4th.) If a vendor can exercise his discretion, not only when to sell but also *where* to sell, and the vendee is bound as long as he exercises *good faith*; if, as in this case, he can transport it to New York city, and sell two months after, why can he not transport it to England, or to California, or India, as long as he thinks he can do better thus? i. e. exercise good faith. Where is the end to this power to dispose of the property of another without notice or knowledge on his part? And what becomes of the rights of the vendee? We submit this cannot be. The true rule is the one claimed by us. (5th.) The plaintiffs sold the grain, *in fact*, as *their own*, and not as agents for the defendant. And hence it was a clear conversion and rescission of the contract.

5. This question as to this sale not being authorized, or a legal measure of damages, was raised on the trial, and below. (1st.) By exception to the testimony about the sale in New York. (2d.) By objection to the same kind of testimony. (3d.) By objection to Van Vleet's testimony on the same point. (4th.) By the decision of the referee refusing to nonsuit the plaintiffs for reasons stated, especially for third cause stated; and lastly, by (5th.) The exception of the defendant to the second conclusion of law of the referee, which finds that the notice, &c. "was sufficient in law to authorize *the sale made by them*." It is true, in the court below, the principal reason given and argument was, that there was no notice of time or place of sale, but the exceptions and objections, as will be seen, were to the whole matter, and bring up the whole matter.

But even if the argument or reason urged here was not

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urged below, that is no objection. The case shows that the facts, with regard to the sale and notice, found by the referee, were just as stated by the plaintiffs themselves, and that, at least, as far as regards them, if raised below, they could not have proved any thing to obviate the argument raised on appeal. The court have the facts as to the sale and notice of the same, and market price, just as agreed upon by the parties, or as sworn to by the plaintiffs themselves. We raised the questions all below, but even if it be admitted that here we urge another argument in support of our position, to that there can be no objection. The court thus having the *facts as they are*, which cannot be altered, will apply the law thereto, and, as we submit, must, for the reasons hereinbefore stated, reverse the judgment and vacate the reference.

Folger & Mason, for the respondents. I. John Coryell had no such interest in the subject matter of the action, as makes it necessary that he be joined in it as a plaintiff, or otherwise. Even if the facts made Coryell a partner, he was a *dormant partner*. And a dormant partner need not be joined in an action as plaintiff. (*Alsop v. Caines*, 10 John. 396. 399. *Clark v. Miller*, 4 Wend. 628. *Clarkson v. Carter*, 3 Cowen, 84.) But the facts of the case do not warrant the legal conclusion that he was a copartner with the plaintiffs in this transaction. The relative condition of the parties does not depend upon the words used, but upon the entire scope of the arrangement between them. (*Loomis v. Marshall*, 12 Conn. R. 69. *Turner v. Bissell*, 14 Pick. 192.) The whole scope of the arrangement between the plaintiffs and Coryell was this: that he should buy barley for them; that they were to be owners, controllers and disposers of it; that he was to have no ownership in it, nor any control or voice in the management of it. He was to be paid for buying it. That was all. And one half of the profits was fixed upon as the standard by which was to be determined what were the wages of his labor. His entire interest was compensation for labor.

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Such a state of facts does not make persons copartners *inter sese*, nor as to third persons. (*Conklin v. Barton*, 43 Barb. 435. *Story on Partnership*, 2d ed. p. 50, §§ 32, 33.) In such case, it is well settled that the contingent participant in anticipated, or the certain sharer in accrued, profits, is not to be held as a partner. (*Mair v. Glanure*, 4 M. & S. 240. *Dey v. Boswell*, 1 Camp. 329. *Wish v. Small*, *Id.* 331. *Dunham v. Rogers*, 1 Barr. 255. *Ross v. Drinker*, 2 Hall, 415. *Ambler v. Bradley*, 1 Verm. 119. *Muzzy v. Whitney*, 10 John. 226. *Mumford v. Nicoll*, 20 *id.* 171.) It is the intention of the parties which is to be sought for. (*Story on Part.* § 36.) Participation in the profits is, at best, but presumptive of the existence of a copartnership. The presumption may be repelled, and the participation be shown to be merely a compensation. (*Story*, § 41, and see § 48. *Burckle v. Eckart*, 1 Denio, 337. *S. C.*, 3 N. Y. Rep. 132. *Vandenburg v. Hull*, 20 Wend. 70.) In order to Coryell being a partner, he must have an interest in the stock, with the right of control, and must be liable to losses. (*Ogden v. Astor*, 4 Sandf. 311, 321. 43 Barb. above cited.) Again, The rule is varied when the parties are plaintiffs seeking to enforce a liability, rather than defendants against whom a liability is sought to be enforced. (*Burckle v. Eckart*, 3 N. Y. Rep. 142. *Shankland, J. dissenting opinion and cases there cited by him.*) And note, too. The plaintiffs, by the agreement with Coryell, *had the sole right to dispose of the barley*. Hence, they only could be the vendors. They only could sell and *contract* to sell; with them only could the contract be made, and they being the sole parties to it of the one part, could alone bring the suit to enforce it against the party of the other part. But it is at times claimed that, though Coryell is not a partner, yet he had some sort of interest in the subject matter of the action, and so by force of the 111th section of the Code of Procedure, the action must be prosecuted in his name jointly with those of the plaintiffs. But if it should be held that Coryell is a *real*

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party in interest, still it is not necessary that he should be a party to the action. For the contract certainly was not made by the defendants with him, nor with him and others. The contract was made by the defendants with the plaintiffs, Lewis & Cobb, and with none other. If Lewis & Cobb made that contract otherwise than as the sole parties of the one part to it, otherwise than as alone interested in it, and as alone to be benefited by it on that side, they must, in the language of the 113th section of the Code of Procedure, have made it "in their name, *for the benefit of another*," to wit, Coryell. They, Lewis & Cobb, the plaintiffs in this action, are the "persons with whom, or in whose name the contract is made for the benefit of another." And if so, then by force of the 113th section of the Code, they are the "trustees of an express trust," within the meaning of the 113th section, and by its authority "may sue without joining with them the person for whose benefit the action is prosecuted." In this wise, then, it was not necessary that Coryell should be joined as a plaintiff in the action. If it be said that one partner cannot be a trustee of an express trust for another partner, it has already been shown that Coryell is not a partner. And, moreover, it is not a universal rule that one partner may not be the trustee of an express trust for another partner. The terms of the contract between them may make the one a trustee for the other. And such are the terms of the contract in this case. If, under the agreement in this case, Coryell is a partner with the plaintiffs, then, by the same agreement, are they to have sole control, to manage alone, to sell alone, to receive avails alone, without his intervention, as his trustee, so far as his interest is concerned. (*And see North v. Bloss*, 30 N. Y. Rep. 374; *Code of Procedure*, § 119.; *Hurlbut v. Post*, 1 Bosw. 36.) Again, if there would be any thing in the position that Coryell is the real party in interest, and should have been joined in the action, the defendants have waived the objection by pleading a counter-claim in favor of the

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defendants and against the plaintiffs, Lewis & Cobb, on the contract in suit. (*Secor v. Law*, 9 *Bosw.* 163, 185.)

II. At the close of the plaintiffs' case, the defendants moved to dismiss the complaint, for this, with other reasons, that "no money was paid, or no part of the 2000 bushels of grain last contracted for, had been accepted by the defendants, and as to the 3000 bushels the defendants had offered to fulfill." In other words, the defendants claim that the contract of the parties, so far as the amount of grain over the 3000 bushels is concerned, is within the statute of frauds, and therefore void. This position is tenable only upon the assumption that there was no memorandum in writing of the agreement; that there was no part of the purchase money paid, and that there was no part of the grain delivered to the defendants. (2 *R. S.* 136, § 3.) It is true that there was no memorandum of the agreement, in writing. But it is not true that the buyer did not accept and receive a part of the grain over and above the 3000 bushels in store when the agreement was made. Nor is it true, that the buyer did not at the time pay some part of the purchase money. In the first place, the fallacy of the defendants is in supposing that there was one bargain for the 3000 bushels, and another bargain for the rest of the grain. It was all one agreement. The referee has found that the agreement of the parties was as it is set forth in the complaint. At page 18, case, *folio* 68, the referee says that the plaintiffs insist that the entire amount of 5000 bushels was embraced in the contract of that day. At page 21, case, *folio* 82, he says: "Upon the whole, my opinion is, that the weight of evidence is in favor of the contract, as stated by the plaintiffs." At page 25, *folio* 98, of the case, he finds that the defendants made with the plaintiffs the agreement for the purchase and sale of barley in the complaint stated and set forth. The contract is stated by the plaintiff Cobb, at page 32, of case, *folios* 127, 129, 133, 134. At the last folio he says that the payment of the money

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was about the last thing. And so at *folio* 136, "all our conversation was one, and *after we got through with it*, he paid me \$3000." And in the findings, as settled by the referee, he again states that the agreement was as is set forth in the complaint. There was then but one bargain between the parties certainly for 3000 bushels of barley, and contingently for as much more as the plaintiffs could obtain, up to the limit of 5000 bushels in the whole. Upon this bargain, \$3000 were paid by the buyers, the defendants, at the time it was made. Upon this bargain, 700 bushels and over, part of the goods, were accepted and received by the buyer. (*McKnight v. Dunlop*, 1 *Seld.* 537.) But even if we concede that there were two bargains, one for the 3000 bushels, and one for all over that amount, still the second bargain is not liable to the objection of the defendants. (1.) There was no payment of money, until after both bargains had been concluded. Then, the buyer paid some part of the purchase money, and paid it on both bargains, as much on one as the other, as much on the last as on the first. (2.) The grain accepted and received by the buyer was as much a part of the barley bought and stored after the agreement, as it was of the 3000 bushels which was at the time of the bargain in store. The testimony shows that all the barley was in the storehouse before the 5th of January, 1865, and that it was all stored together. And it was from this barley, all stored together, lying in the same bins, that the part accepted and received by the buyer was taken. So that, taken as one bargain, or as two bargains, the buyer paid upon the one or upon each, a part of the purchase money, and accepted and received upon the one or upon each, a part of the goods sold. And in this view, the defendants did not offer to fulfill; for they offered to furnish drafts, only on a contract for 3000 bushels. The plaintiffs waived their right to cash, only on a contract for the 3000 bushels, and for the additional quantity purchased by the plaintiffs for the defendants. Even if the defendants had been right in their position, that they con-

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tracted only for 3000 bushels, still they did not offer to fulfill that contract, for payment of cash alone would have done that. And *quære*. If the transaction between the parties as to so much of the barley as was not already owned by the plaintiffs was another contract, can it be said to be within the statute of frauds? for the plaintiffs *were not bound to sell*, although the defendants *were bound to buy*. The plaintiffs were only contingently bound to attempt to buy, and, if successful, to deliver to the defendants the result of the attempt.

III. The plaintiffs had a right, on the failure of the defendants to fulfill the contract on their part, to notify them of a purpose to sell the barley, and had a right then to sell the same, in good faith and in the best manner. And the defendants are liable to the plaintiffs for any deficiency arising upon the sale from the contract price of the barley, with interest thereon and expenses incurred. The finding of the referee is, that the defendants made a breach of their contract, and failed to perform; that the plaintiffs thereupon gave notice to the defendants that they should sell the barley on hand to the best advantage, and hold the defendants responsible for the deficiency, if any. The referee further finds that the plaintiffs sold the same for the best price that could be obtained, and made the sale in good faith, and that there was a deficiency upon that sale. The contract, being that which is set out in the complaint, the defendants did not fulfill. The plaintiffs then had a right to damages from the defendants for their failure to perform.

It remains but to ascertain the rule by which those damages shall be fixed and awarded. The rule is as follows: Where the vendee is sued for non-performance of his contract, the vendor may show a resale of the goods while in his possession, and charge the vendee with the difference between the contract price and the price realized at the sale. (*Sedgwick on Dam.* 281, and cases there cited. *Chitty on Cont.* 430, 431. *Bogart v. O'Regan*, 1 E. D. Smith, 590.

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1 *Pars. on Cont.* 446 ; citing 4 *Bing.* 722 ; 4 *Esp.* 251 ; 5 *S. & R.* 19 ; 5 *John.* 395 ; 1 *Sandf.* 279 ; 4 *Barb.* 564.) The defendants had completely refused to carry out their bargain, and so the plaintiffs had a right to resell and charge the defendants with the loss. (*Sands v. Taylor*, 5 *John.* 395.) The plaintiffs had the right to have from the defendants the money which the defendants had agreed to pay. The defendants had no right to impose upon the plaintiffs, the further toil and trouble of caring for and selling again the barley. The plaintiffs might have left it in the storehouse, ready for delivery when called for, and have sued for and recovered the contract price. (*Sedgwick on Dam.* above cited.) What the plaintiffs did in this case was so much more than their legal duty to the defendants, but still what they had a right to do, to save the property from loss and waste, and to guard themselves from a possible inability on the part of the defendants to meet the plaintiffs' just demand against them. And the only question is did the plaintiffs act in good faith? Their good faith is expressly found by the referee. The defendants had completely refused to carry out their contract. This gave the plaintiffs a right to resell and charge the defendants with the loss or difference. (*Sands v. Taylor*, 5 *John.* 395.) It is well to note the reason given for the decision in the case last cited. The decision is put upon the ground : 1st, that, by the contract and the part execution of it, the title to the property sold was changed, and the vendees (the defendants) became the owners of it ; 2d, that, by the refusal of the vendees, (the defendants,) to receive the property, the vendors, (the plaintiffs,) became the trustees or agents for the vendees, and must either abandon the property to waste, or must proceed to sell it. The point we wish to press is, that the vendees (the defendants) were still holden to the contract, and the vendors (the plaintiffs) had still the right to hold them ; that the property was the property of the vendees, and that the vendors were, by operation of law, the agents of the

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vendees to manage and dispose of it. (See pages 405, 6 of case last cited.) As is remarked in *Healy v. Utly*, (1 Cowen, 353,) "the plaintiffs were of necessity compelled to dispose of it." Being then the agents or trustees of the defendants, it matters not what the plaintiffs did with the barley, so long as it was done in good faith towards the defendants, honestly seeking the advantage of the defendants. In all their dealings with the barley after the defendants' refusal to perform, the plaintiffs acted only as the agents or trustees of the defendants. They did not change or affect their character as vendors, and still as such had and have the right to recover the contract price of the goods sold.

The rule is not as the defendants contend, the difference between the contract price and market price on the day of the failure to perform, or on any other day. The plaintiffs have no concern in the market price. The plaintiffs had the right to have from the defendants the money which they had agreed to pay; and this merely upon the delivery of the barley. The refusal of the defendants to receive and pay the contract price created new relations between the parties, and gave the plaintiffs the option of further and different action. This option they took. What the plaintiffs did then was so much more than their legal duty to the defendants as *vendors* to them. It was done in their new relation of *trustees or agents*, a relation created by the necessity of the case. And the only inquiry is, did they, as such trustees or agents, act in good faith? This rule has been often recognized in the courts of this state. (*Crooks v. Moore*, 1 Sandf. 297. *Pollen v. Le Roy*, 30 N. Y. Rep. 549, and cases cited in these authorities.) But conceding that the rule is as stated by the plaintiffs, the defendants claim that the resale of the barley by the plaintiffs was irregular, in that there was no notice of the time and place of sale. To which the plaintiffs reply: (1.) That it matters not. The plaintiffs were then acting as agents of the defendants, and the sole inquiry is, did they act in good faith, and with the

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honest intent of benefiting the defendants. (2.) The law does not require that, in such a case, notice of the time and place shall be given. (*Crooks v. Moore*, above cited. *Pollen v. Le Roy*, above cited, p. 556. *Bogart v. O'Regan*, 1 E. D. Smith, 590.) Nor does the fact that the barley was sent to New York city for sale, put the plaintiffs in the wrong. (*Jackson v. Covert*, 5 Wend. 139. *Kingman v. Hotaling*, 25 id. 423.) The plaintiffs, if acting in good faith, could seek what was in their judgment the best market for the defendants. The case of *Mallory v. Lord*, 29 Barb. 454, upon which the defendants rely, is easily distinguishable from this. That was not a case of a vendor in possession, holding the property after a failure by the vendee to perform, but it was a case of a conditional sale, where the title to the property had never passed, where the vendor was the owner still of the property; and the decision of the court in that case, while recognizing the existence of the rule above stated, held that it did not apply to the facts before it. The defendants also rely upon the case of *McEachron v. Randles*, (34 Barb. 301.) But it is sufficient to say of that case, that it is noticed and commented upon, in the case above cited in the Court of Appeals, (*Pollen v. Le Roy*), and is disapproved. And indeed, in *McEachron v. Randles*, the resale was without any notice, or any intimation of an intention to sell. And is not all the notice that the law requires this; that the vendor shall explicitly inform the vendee, that he means to seek his remedy *pro tanto*, by a resale of the property. For in *Crooks v. Moore* above cited, though the notice specified the time, yet the sale was not made until a month after that time. So that notice of time in that case would mislead rather than aid. Yet the court held the sale good though based upon that notice. And that decision is approved of by the Court of Appeals, in *Pollen v. Le Roy*. Nor is it necessary, that the sale should be in any specific way, or that notice of that specific way should be given. If the best, and usual method is by public auction,

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that method may be followed. If by the employment of a broker, that method may be employed. (*Pollen v. Le Roy*, above cited, p. 557.)

So far, we have gone on the assumption that this point is fairly in the case. But it is submitted that the defendants are not in a position to raise this question, in this court, on appeal. The defendants do not, in the progress of the trial, any where make a specific objection which meets the point now raised. The objections are all of the most general character. Hence they are not available here. (*Requa v. Holmes*, 16 N. Y. Rep. 193, 201. *Day v. Roth*, 18 id. 448, 451.) But at all events, the defendants cannot here insist upon greater scope to the point raised by them, than is within the terms of the objection as stated and argued before the referee: The point made before the referee, or in the language of the referee, "the precise objection presented by the defendants was, that neither the time nor place of sale was contained in the notice given, and that both were necessary." The cases hereinbefore cited, show it is submitted, that notice, specifying time and place is not necessary. That all that is requisite, is such a notification as will explicitly apprise the vendees of the purpose of the vendors to resell the property, and to hold the vendees liable for a deficiency. And the reason why no more is necessary is evident, and it is that the control of the whole matter is in the hand of the vendees. They have but to perform their contract, they have but to pay what they have agreed to pay, and they may take the property and sell it as, and when, and where they like. If it is not so sold, they are the party in the blame. And it is noticeable, that this matter of the resale, and of the notice of the time and place of it, was not the point in difference and dispute between the parties. The defendants deliberately repudiated their contract and flatly refused to carry it out. They took their stand there. They made no objection when notice of intention to sell was given, of want

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of particularity. This objection was not started until after suit was commenced to enforce the repudiated contract.

IV. If it is established by the authorities that a vendor in possession of the residue of the goods sold, may on the failure of the vendee to receive that residue and to pay the contract price, resell the same on notice of his intention so to do, then the plaintiffs were correct in their action with this barley. For they gave the defendants explicit notice of such intention. If it is established by the authorities that from that time they were the agents or trustees of the defendants, and that all that could be legally required of them was to act in good faith towards the defendants, then they have shown themselves within the legal rules. For they did act in relation to this barley in good faith. They made effort to sell the barley at the place of making the contract. Failing in this, they shipped it to New York, and sold it there, in the usual course of the trade, by a broker, for the best price that could be obtained. It is to be noted, too, that it was in the power of the defendants, at any time after the notice was given by the plaintiffs, and before the sale, to have possessed themselves of the barley by paying the contract price. So that all results are chargeable directly to them. Theirs was the breach of the contract; theirs was the refusal to perform; theirs was the neglect again to fulfill after the notification from the plaintiffs of intention to sell, and—theirs should be the loss. To test this, consider what the plaintiffs might legally have done. They might have let the barley lie until this day, when it would have become utterly spoiled, and still have recovered of the defendants the whole contract price. But they did better for the defendants than this. They apprised them distinctly, and at once, that they should hold them to their contract, that they should sell the barley on the best terms. They did so sell it, and thus the defendants are liable, only for a balance of the contract price, instead of the whole of it.

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McDonald, in reply. I. The counsel for the respondents claims that Coryell is only a *dormant* partner, and hence should not have been joined, citing several cases—all before the enactment of the Code. We admit that before the Code such was the law, but since then the law has been that dormant partners must be joined as *parties plaintiff*; (see 4 *Duer*, 416;) hence the authorities (being before Code) are not in point. Nor will it do to claim that Cobb & Lewis were trustees of an express trust. In this case there is no such relation as is contemplated by law. Hence, for reasons before stated, Coryell should have been joined as party plaintiff, and as he was not, the judgment should have been reversed.

II. As to the question submitted in our second point, as to the mistake of the referee with regard to the evidence in the case, it may be answered that by an examination of the books it will appear that the word *prime* was written in afterwards. This may so seem, but *how long* afterwards? On examination it will also appear that another portion of the memorandum was apparently written at the same time with word "prime." In fact we claim that at the same time or the same evening the defendant Greider, on looking over his memorandum, saw that he had omitted some things and put them in. But the error is this, that the referee by *mistake* has passed upon the case on the ground there was no such word *there*, not that it was written in afterwards. In this he admits by his certificate he was mistaken. Hence, as we have said before, we have not had a *fair trial* on the evidence, but only on a portion of the evidence. In cases where testimony is rejected that is proper, or even in cases where improper evidence is admitted, the court will always reverse, unless it is a very clear case that the evidence could not in *any point of view* have had any effect or influence. (*Weber v. Kingsland*, 8 *Bosw.* 515, 445, 446. *Worrall v. Parmlee*, 1 *Comst.* 419. *The People v. Wiley*, 3 *Hill*, 194, 214.) In this case the omission to consider the evidence did, by the

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confession of the referee, in his opinion, have an effect. Nor can the plaintiffs now raise the point that the word prime was written in afterwards, as he did not raise it below; and had he done so the plaintiff could have produced evidence to explain it. The fact is that, as we claim, and as the court must see, the defendant has not had a *fair trial on all the legal testimony*, and that without any fault of his, and it may be without any fault on the part of any body, simply the oversight of the referee. Clearly, from the authorities, the defendant should have a *fair trial* on the consideration of *all* the evidence, and now should have a new trial. Just what should be the decree as to costs is not so clear, although we claim it should be the usual one, to abide event.

III. On the third point, as to what is the true rule of damages, it may be that according to *the facts found* by the referee, the defendant would not be entitled to any verdict under the decision of this court, in *Monroe v. Reynolds*, (47 Barb. 575;) but that does not affect the reasoning in the points to show that the defendant should have no judgment against him. On a new trial, (if one is granted,) the facts may be found as sworn to by the defendant, and in such case he must have a verdict. In support of the position of the counsel for the respondents, in his third point he cites only one authority on the main question that we have not already considered, viz: *Bogart v. O'Regan*, (1 E. D. Smith, 590.) On examination of that case it will be seen that it comes directly within the rule claimed by us, including all that is *obiter* in the opinion. In that case there was an immediate sale at the place of delivery, and what is more, as the court says, (p. 592,) "an express authority conferred to sell the goods." Hence the plaintiffs take nothing by this case.

IV. In answer to the objection that our third point was not fairly raised below, and hence cannot be considered here, in addition to the statements in our former points we would submit: That the very cases (16 N. Y. Rep. 183. 18 *id.* 448) cited by the defendant show the contrary. The counsel for the re-

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spondents quotes from the *opinion* of the referee to show what the exception of the defendant on this point was. As will be seen by the references made to the *case as settled* in our former points, that was not the precise objection raised. The objection raised was, that the testimony of sales in New York was *immaterial evidence* and improper. On the motion for nonsuit the point was, "because no legal damages had been shown;" and again by the referee's second finding of law, and the defendant's exception thereto. The statement by the referee in his opinion arises from the fact that the *main reason urged below* was that no notice of time or place was given. At that time the decision of *Pollen v. Le Roy*, (30 N. Y. Rep.) was not published, and the decision of general terms, 29 and 34 Barb. seemed strong enough to rely upon, and hence the attorney for the defendants did not strongly urge any other. Hence the statement of the referee that such was the point. We submit that it cannot be that because counsel does not urge an additional or any reason below, he cannot urge it above. Were that so, there could be no advance in argument. The true rule is that if you have raised your question, you can argue it above as you like, as you did below, or differently. In *Requa v. Holmes*, (16 N. Y. Rep. 193-212,) there arose two objections; 1st, to the admission of evidence. The appellant tried to make the objection *particular* on appeal where it had been *general* below. The court says that a part of it was proper. Hence, as the objection was general it did not avail. This no one doubts. But further on in the case there is another claim that an exception was too general, and that exception is in all respects like this. But the court as to that say: "The exception was as specific as the ruling or charge. It was unnecessary to state the *reasons* why the charge was, or was supposed to be erroneous." So in this case, the exception was as specific as the ruling. It is not competent to refer to the *opinion* to find out what the exception was, only in *cases of doubt*. The *case as settled* shows and is the best and,

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unless in cases of doubt, the *only* evidence of what took place and was held—what was excepted to, and how it was excepted to below. We therefore refer to the case as settled. That shows that the evidence as to sale in New York was several times excepted to, not because there was no notice of time or place of sale, but because it was incompetent. Hence we have the right to now urge *any reason* why such testimony should not have been admitted. It will not be claimed that the evidence of sale in New York is competent except as a *rule* of damages. It could not possibly be *any evidence* of damages at Lodi Landing, the place of delivery. Hence, unless it is proper as the *rule* of damages, it is not proper for any purpose, and should not have been admitted. This is the point we now raise.

Again, the referee rules and decides, "*that the notice given by the defendant to the plaintiffs of their intention as to the sale of the grain and the application of the proceeds as above set forth, was sufficient in law to authorize the sale made by them.*" Now we understand this court to have decided, at the last term, in the case of *Leffler v. Fields*, that the defeated party has the right (within the ten days after the delivery of report allowed by the Code) to take *any exception* to the findings of law by the referee that he would have had in case of trial by jury the right to take, had *the same proposition* been included in the charge of the judge to the jury. Now, supposing on a trial by jury, the judge had charged in the words above quoted and the defendants had excepted, would there be any doubt that the question now submitted was fairly raised, or, in the words of the court in *Regua v. Holmes*, that "the exception was as specific as the ruling or charge?" &c. (*Id.* p. 201.) We submit not. In the case of *Day v. Roth*, (18 N. Y. Rep. 448,) a *series* of letters were offered in evidence. There was a *general* objection and exception below. The court say that *at least one* of the letters was not only competent but *important* evidence, and the exception being to all the letters, was not well taken. This

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is undoubtedly the law. But in this case, if we are right, the evidence is *entirely incompetent* for any purpose, and if that be so, the exception is well taken, as decided by all the cases. This view is sustained also by *Collyer v. Collins*, (17 Abb. 467;) *Spaulding v. Hallenbeck*, (35 N. Y. Rep. 204.) But even if, for the sake of the argument, it be admitted that the question now raised was not specifically raised below, (which is denied,) yet it would be proper to raise it on appeal, because if raised below the plaintiffs *could not have produced any proof* to avoid the question, or alter the facts bearing upon it. That the sale was in New York will not be questioned, and as to how it was made, the witnesses of the plaintiffs tell, and there is no controversy. And, moreover, the finding of the referee that the sale was *in good faith* is as favorable to the plaintiffs as possibly could be. The contract price at Seneca lake is admitted in the case, and the reasons for the transshipment and sale at New York are explained by Cobb. These are all the facts that in any way relate to this question. Hence we submit that even under the claim of the counsel for the plaintiffs, the point taken by him is not tenable, because had the reason been given *explicitly* below, as it is here, the plaintiffs could not have proven any different state of facts, or at least any *more favorable* to the plaintiffs than as now found by the referee and on which it is now argued. If we are right in our premises we need cite no authority, as this principle is too well established.

By the Court, JOHNSON, J. Upon the facts found by the referee Coryell was not a partner with the plaintiffs, in the barley purchased by him for them. He was their agent merely, depending for the measure of his compensation upon the amount of profits realized by the plaintiffs from the transaction. (3 Kent's Com. 33.) Even if he was interested in the amount which might be recovered in the action, he was not necessarily a party, not being part owner of the article sold. The contract was properly between the plaintiffs and the

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defendants, and although Coryell was, in a certain sense, beneficially interested in the contract, the action was properly brought in the name of the plaintiffs without joining him. (*Code*, § 13.)

The refusal of the defendants either to pay the money, give security or do any other act in fulfillment of the contract, gave to the plaintiffs the right to sell the barley on the defendants' account and hold them responsible for the deficit in the price. (1 *Parsons on Cont.* 446.) And it was not necessary for the plaintiffs to give the defendants notice either of the time or place of sale. (*Pollen v. LeRoy*, 30 *N. Y. Rep.* 549.) They did give general notice of their intention to sell, and that was enough. The law in such a case constitutes the vendor in possession of the goods the agent of the vendee, for the purpose of such sale. As such agent he must act in good faith, and take proper measures to secure as fair and favorable a sale as possible. Probably no notice to the vendee is strictly necessary of the intention to sell, though notice of some kind, of such intention, is always a wise precaution. This notice was on the 15th of March, 1865, the day on which the defendants refused to fulfill the contract on their part. After this the plaintiffs tried, without success, to sell the barley at Geneva, and finally concluded to ship it to New York, where it was sold in the usual way, at the best price which could be obtained in the market. This shipment, as the referee finds, was in good faith, for the purpose of getting the best price which could be obtained. The defendants' counsel contends that if the plaintiffs had the right to sell at all on the defendants' account as their agents, they were restricted to the place of the delivery of the grain named in the contract, and to a time necessary for reasonable notice after the right to sell accrued. But I am of the opinion there is no such limitation to the right. Doubtless the sale should be within a reasonable time. But what would be a reasonable time might depend upon a variety of circumstances. And as to place, if the article could not

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readily be sold at the place of delivery fixed by the contract, or a better and more advantageous sale could be effected elsewhere, it would, I think, be the duty of the vendor to go where he could get the best price and readiest sale, not out of the usual course of trade in marketing such property. There is nothing to show that the defendants have lost any thing by the delay, or by the sale being made in the city of New York. It was sent forward as soon as navigation opened, and that course was adopted in good faith by the plaintiffs for the purpose of making the most that could be made out of the barley. These questions as to the delay in selling, and the sale having been made at an improper place, were neither of them distinctly raised upon the trial. Had they been raised there, additional evidence might have been given as to the necessity, and advantage to all parties, of delaying the sale till the opening of navigation and then sending to and selling in New York. So far as these considerations bear upon the case, these questions now first distinctly presented are of no avail and should not be considered. They can only be raised and urged here, upon the ground that the plaintiffs had no right, under any circumstances, to delay the time they did, and send the property to New York to be sold on the defendants' account. This seems to be the ground taken, and upon which the point is now urged. In this aspect it is plain that the case could not have been changed by any additional evidence, and so far, I think, it is a proper matter for consideration. But this ground, I think, is wholly untenable. It is not, as the learned referee suggests, a judicial sale, in any sense; and it seems to me very clear that the vendor, acting as the agent of the vendee, under such circumstances, would be authorized, if not absolutely required, to sell when and where the most advantageous sale could be effected for the interests of the vendee. Of course he would not be required to go out of the ordinary course and channels of trade. But within those bounds, if he acts

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in good faith, and does what he believes will be for the best interests of his principal, he should be protected.

And the ground upon which the defendants' counsel asks for the reversal of the judgment, is that the referee overlooked and failed to take into consideration a portion of the defendants' evidence. It is assumed in this point, that the referee, when the memorandum of the defendant Greider of the purchase made by him of the plaintiffs was presented, did not notice the word "prime" which had been added by way interlineation or addition to the memorandum as first made, or that if noticed at the time it had been forgotten by the referee when he came to decide the case upon the evidence; and the inference is drawn that if the referee had noticed and remembered this interlineation, when weighing the evidence, the poise, or inclination of the scales, would, or might have been, in the defendants' favor, instead of the plaintiffs'. The presumption certainly is that the referee did not overlook the terms of the memorandum, or fail to consider it as it stood at the time of the trial, in weighing the evidence to determine where the preponderance lay, on the disputed question of fact. It is for the defendants to show clearly that such an error or mistake has occurred, before he can ask the court to act upon it. I do not find in the case any satisfactory evidence whatever that there has been any such error or oversight. The only evidence is, in the opinion of the referee, where the memorandum is referred to, as containing nothing on the subject of the quality of the barley, and raising the inference that it was to be merchantable barley only. The legitimate inference from this clearly is, not that the referee had not discovered the interlineation, or had forgotten it, but that he had rejected it, as being no part of the memorandum as originally made, and only the work of an afterthought thrown in as a make-weight. Precisely how the referee viewed it is matter of conjecture only. Nor could it be expected his opinion would disclose the precise amount of force given to each circumstance, or the particles rejected in striking the

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balance. It would never do to reverse judgments on grounds so uncertain and hypothetical as this. The other questions in the case are all questions of fact, upon which the finding of the referee is conclusive.

The judgment must therefore be affirmed.

[MONROE GENERAL TERM, September 2, 1867. J. C. Smith, Welles and Johnson Justices.]

 ALLEMAN vs. DEY.

In an action of trespass *quare clausum fregit*, brought in a justice's court, the plaintiff's title to the premises was derived from, and acquired under, a deed from D. and wife, in which the grantors reserved title in one half acre of the land, used for a cemetery; with the right of way to and from it. On the trial, the defendant asserted the right under the exception or reservation in such deed, to go to the cemetery, across the plaintiff's land, for the purpose of burying a relative. The defendant did not plead title, and the plaintiff gave no evidence of title, but simply proved his possession, and the defendant's entry upon his close, and the damages sustained. The defendant then gave certain deeds including that to the plaintiff, in evidence, for the purpose, as stated by his counsel, of showing the extent, limitation, and restrictions of the plaintiff's possession, and not with a view to show title. *Held* that for this purpose, the deeds were clearly unavailable.

A right of way across the land of another, for the purpose of going to and from a cemetery, is an easement—an interest in land—and affects the title to land; and such title cannot be tried in a justice's court.

A PPEAL from a judgment of the county court of Seneca county.

One Richard Dey, for many years prior to October 1, 1845, owned a farm in the town of Fayette, Seneca county, upon which was a "cemetery" entirely surrounded by his land. In this "cemetery" his relatives, friends and neighbors had been accustomed to bury their dead for over forty years before this suit was commenced. On the 1st day of October, 1845, the said Richard Dey, conveyed said farm to James

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R. Dey and Jacob C. Dey, *in trust* for certain purposes. On the 15th day of April, 1856, James R. Dey, *one* of the joint trustees, conveyed said farm to the plaintiff, but the conveyance contained a reservation and exception in these words: "excepting and reserving from this conveyance the '*grave yard*,' on the said premises and the ground about the same, to be laid out in a square form, so as to contain one half acre of land. But said party of the second part, his heirs or assigns are not to be charged with the trouble or expense of keeping up the fence about said grave yard, nor shall he or they be liable for any damage happening to the said grave yard or any thing thereon, by reason of there being no fence, or a bad or insufficient fence about the same; and also reserving a right of ingress and egress to and from said grave yard for the purposes thereof with needful vehicles," &c. Subsequently to the execution and delivery of this deed, and on the 11th day of June, 1856, the plaintiff procured from said James R. Dey, *one* of said trustees, a writing signed by him, and under seal, in these words:

"Whereas, by deed dated April 15, 1856, from me and wife to Jos. D. Alleman, I did convey to him certain premises in Fayette, Seneca county, and did reserve and except therefrom a certain piece of land for a grave yard and a right of ingress and egress, I do hereby declare that all that was intended thereby was and is, that the graves and tombstone now there, and the space of ground therein reserved, shall be and remain in the condition that it now is so far forth, that there shall be no more burials there, unless by special permission from me, first had in writing, and the right of ingress and egress may be for the purpose of keeping the premises in good order by putting a new fence when required or mending the same, preserving the grave yard in good condition and appearance, ornamenting and beautifying the same with trees or otherwise; and that the descendants of Mrs. Hannah Dey, whose body is interred there may have the privilege at proper times and seasons, when there is no crops

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on the adjoining ground that can be materially injured, to visit her grave, with that respect due to her memory."

On the tenth day of December, 1856, the defendant procured from *both* said trustees an instrument in writing *in these words* :

"I hereby consent to the burial of any descendant or blood relative of General Richard Dey of Preckness, New Jersey, in the burial ground reserved from the farm of the late Richard Dey, deceased, of Fayette, Seneca county, state of New York, and empower the friends and relatives of any person so deceased to enter upon said ground and inter their dead."

In March, 1865, the burial of Teunis Dey took place, who was a nephew and *blood relative* of General Richard Dey, of Preckness, New Jersey, as was also the defendant, who was a *blood relative* and friend of the said Teunis Dey. At this burial the defendant and others entered upon the premises in question to go to and from this "cemetery" to bury the dead body of said Teunis Dey, and for no other purpose and doing no damage, except to pass over the then-growing wheat, by the shortest way, and about eighteen rods. For this passing over the plaintiff's premises this action was brought, before a justice of the peace, of Seneca county, and was tried October 13th, 1865, by a jury, who rendered a verdict therein for the defendant, upon which the justice rendered a judgment against the plaintiff for the costs. From this judgment the plaintiff appealed to the Seneca county court, which latter court affirmed said justice's judgment. From that judgment the plaintiff appealed to this court.

Folger & Mason, for the appellant.

S. G. Hanley, for the respondent.

By the Court, E. DARWIN SMITH, J. All the title which the plaintiff had in the farm in his possession at the time of

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the alleged trespass complained of in this action, he derived from, and acquired under, the deed from James R. Dey and wife, dated April 15, 1856. In that deed, the cemetery situate on said farm is expressly excepted to the extent of one half acre of land, with the right of ingress and egress to and from the same. The grantor in the deed clearly reserved title in himself, and his cotrustee, in this one half acre of land used for a cemetery, with the right of way to and from it. On the trial of this action, the defendant asserted this right under the exception, or reservation, to the said trustees of this cemetery, with the right of ingress and egress to and from it, to go to said cemetery across the plaintiff's land, and bury in said cemetery the deceased Teunis Dey, the descendant of General Richard Dey, of Preckness, New Jersey, under the license for that purpose given to the said James R. Dey and J. C. Dey, trustees, &c. The verdict and judgment in favor of the defendant affirms this right, and establishes, if it remains unreversed, the right of way in question as a valid, legal and permanent right. It seems to me the verdict was right on this point, and that the defendant was entitled to carry the said Teunis Dey into said cemetery, and to cross the plaintiff's land for that purpose; but I do not see, nevertheless, how this judgment can be sustained. The action was trespass *quare clausum fregit*, in a justice's court. The defendant did not plead title. The plaintiff gave no evidence of title, but simply proved his possession and the defendant's entry upon his close, and the damages sustained, and rested. The defendant then gave the deeds in evidence, which raised the question of title to the cemetery under the exception in the plaintiff's deed, and the right of ingress and egress thereto and thereupon. In offering the deed, the defendant's counsel stated, at the time, that he did so for the purpose of showing the extent, limitation and restrictions of the plaintiff's possession, and not with a view to show title. For this purpose, they were clearly unavailable. The plaintiff's possession of his farm was clear, unquestioned and absolute, unless a right

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of way existed, under the reservation, or exception, in said deed for the purpose of going to and coming from said burying ground for the purposes in said deed expressed. Such right of way was an easement—an interest in land—and affected the title to land, (6 *Hill*, 343,) and such title could not be tried in a justice's court. (*Code*, § 54. *Striker v. Mott*, 6 *Wend.* 466. *Powell v. Russ*, 8 *Barb.* 567. *Hall v. Hodskins*, 38 *How. Pr. R.* 15.) The defendant clearly had no defense in the action, except in the assertion and establishment of this right of way over the plaintiff's land to this cemetery. As this right could not be tried by the justice, his judgment is erroneous, unless it can be sustained upon some other ground. Excluding these deeds, there is not a particle of defense proved in the action, and it presents, in this aspect of it, a naked case of trespass, for which the plaintiff was clearly entitled to recover some damages. The judgment of the county court must, therefore, be reversed.

Judgment reversed.

[MONROE GENERAL TERM, September 2, 1867. *Waller, E. D. Smith and Johnson*, Justices.]

FITZHUGH and others, executors, &c. vs. RAYMOND.

By the terms of a grant, the plaintiffs' testator had "the right of conveying such quantity of water in an aqueduct under ground as shall be reasonable to be used" by him, "from any reservoir or spring of water now or hereafter found," on the lot occupied by the defendants; "provided that the quantity of water so used should not exceed the equal half part of the whole volume of water supplied by such reservoir or spring." *Held*, that the grant plainly authorized the construction of one aqueduct only, for the conveyance of water through the defendants' premises. That it gave no right to construct several, by way of experiment, to ascertain where the cheapest, or most convenient, or most reliable route could be found, or to dig up the soil for the purpose of discovering other springs.

Held, also, that the grantee, after constructing an aqueduct through the defendants' lands, from a reservoir thereon, and using the same for a number of

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years, had not the right, when the same got out of repair, and from that cause failed to furnish a reasonable quantity of water, to go upon the defendant's lands, and construct another aqueduct, upon another route, and from another spring, nearer to the grantee's premises than the first reservoir, though such new aqueduct could be more conveniently and cheaply constructed than the old one could be rebuilt, and more easily kept in repair.

Held, further, that the grant was not void for uncertainty; because it could be made certain by locating and constructing the aqueduct. *Certum est quod certum reddi potest.*

THE plaintiffs' testator, Allen Ayrault, deceased, was the owner of a certain farm, in the county of Livingston, and the defendant is in occupation of another, owned by one Moss, who holds the fee thereof, subject to the right of the testator, to convey water from said farm occupied by the defendant.

The plaintiffs' testator claimed the right to enter upon the latter farm, to convey such a quantity of water in an "aqueduct under ground as should be necessary or reasonable to be used by him from any reservoir or spring found thereon." In the exercise of this alleged right, he dug a ditch from a spring found by him upon the farm, and the defendant having obstructed his proceedings, this action was brought to recover damages therefor. The plaintiffs' claim depends upon the validity and interpretation of a grant or agreement contained in the deed through which they derive title, and which, in terms, confers "the right of conveying such quantity of water in an aqueduct under ground as shall be reasonable to be used by them from any reservoir or spring of water now or hereafter found on the lots," (occupied by the defendant,) "provided that the quantity of water so to be used, shall not exceed one half part of the whole volume of water supplied by such spring or reservoir." Upon the trial, it appeared from the plaintiffs' evidence, that their testator, some sixteen or seventeen years before that time, selected a reservoir or spring upon the defendant's land, opened a ditch to it, laid an aqueduct, and conveyed the water from the spring, or reservoir, to his premises. And the existence of these facts was also assumed by both parties and the court, throughout

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the trial. It also appeared that this spring, so selected, supplied sufficient water down to a time subsequent to the commencement of the action, and, for any thing that appeared, down to the time of the trial. That in 1860, the plaintiffs' testator selected a second spring upon the defendant's land, and dug a ditch thereon preparatory to laying an aqueduct, whereupon the defendant (as the evidence tended to show) filled up the same, and hence this action. At the close of the evidence, on the part of the plaintiffs, the defendant moved for a nonsuit upon several grounds, and among others, "because the plaintiffs' testator having once selected a spring and route, and laid his aqueduct, he had no right to select another spring, and lay another aqueduct, except upon the failure of the first reservoir to furnish a reasonable quantity for his use, and this failure must be shown to be permanent, and not temporary." The motion was granted, with leave to the plaintiffs to make a case or bill of exceptions, to be heard, in the first instance, at a general term; judgment to be suspended, in the mean time.

Scott Lord, for the plaintiffs.

Geo. F. Danforth, for the defendant.

By the Court, JOHNSON, J. By the terms of the grant, the plaintiffs' testator had "the right of conveying such quantity of water in an aqueduct under ground as shall be reasonable to be used" by him, "from any reservoir or spring of water now or hereafter found," on the lot occupied by the defendant; "provided that the quantity of water so used shall not exceed the equal half part of the whole volume of water supplied by such reservoir or spring."

The question in this case is whether the testator, after constructing an aqueduct through the defendant's lands, from a reservoir thereon, and using the same for a number of years, had the right, when the first one got out of repair,

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and from that cause failed to furnish a reasonable quantity of water, to go upon the defendant's lands, and construct another aqueduct, upon another route, and from another spring, nearer to the testator's premises than the first reservoir, and which last aqueduct could be more conveniently and cheaply constructed than the reconstruction of the old one, and more easily kept in repair. The plaintiffs' evidence tended to show that the new route was the shortest and on a better grade than the old one, rendering the pipes conveying the water less liable to fill up and otherwise get out of repair. And this question, if material, should have been submitted to the jury. But in my view of this case this was wholly immaterial. The grant plainly authorizes the construction of one aqueduct, only, for the conveyance of water through the defendant's premises. It gave no right to construct several, by way of experiment, to ascertain where the cheapest or most convenient, or most reliable route could be found. Such a construction of the grant, or license, would impose a most intolerable servitude and burthen upon the defendant's premises, and one which the parties making it obviously never contemplated. It was never intended to subject them to the changing schemes or mere caprices of another.

When the testator had constructed one aqueduct through the lands occupied by the defendant, which, under the limitations prescribed, was capable of supplying such a quantity of water as was reasonable for him to use, continuously, by suitable and proper care and attention and necessary repairs, he had obtained just what the grant gave him, and the same was completely fulfilled and satisfied, by a location of what was granted, and by seisin in fact. After this he could have no right to go on and construct other aqueducts by way of experiment, or dig up the soil for the purpose of discovering other springs, which he might regard for the time being as more suitable, or practicable, or advantageous to his interest. Any other construction might subject the owner of the premises in question to constant annoyance and injury, if

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not wholly deprive him of the use and quiet enjoyment thereof.

The grant is not void for uncertainty ; because it could be made certain by locating and constructing the aqueduct. The legal maxim is, that that is certain which may be made certain. The right granted was to carry such quantity of water, in *an aqueduct* under ground, as should be reasonable to be used, from any reservoir now or hereafter to be found on the premises. When the aqueduct was located, therefore, and constructed from any reservoir or spring, on the premises, there was no longer any uncertainty, but the right became ascertained, and fixed with as much precision and certainty as could have been arrived at by a survey and metes and bounds. But the grantee is evidently restricted to a single aqueduct. "*Such aqueducts* shall be built only at such a period of the year, when it can be done without injury to the crops of grain or grass growing on the land." This clearly contemplates a single subterranean structure, and no more. It is not a shifting right in respect to locality, after the grant has once been satisfied. Had it turned out, after the first aqueduct was completed, that the spring, or fountain selected, would not furnish the reasonable quantity of water to which the testator was entitled by the terms and spirit of the grant, or that by reason of the unfavorable grade the water would not flow through it by any degree of care and attention, it may be that he would have had the right of changing the route, or electing another spring or fountain, to draw from. I have no doubt he would have such right, in that case. The main purpose of the grant was to enable the grantee to supply himself with water, under the limitations prescribed, from the lands of the grantor, if reasonably necessary. Indeed, this court so held, substantially, when this cause was before it on a former occasion. But this is no such case. Here, most clearly, was no failure of supply at the fountain first selected, except such as was caused wholly by the neglect of the testator in not keeping the fountain in repair. It washed

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down so that the water did not come up to the mouth of the pipes or logs, and in that way failed for a time. But it is not shown that it could not be readily repaired and the water raised in it to the requisite height. And it has been in fact repaired since this action was commenced, as the evidence plainly shows. Another cause of temporary failure was the bursting of the pump logs, which were originally defective or which had decayed. The water did run through the pipes or logs without any difficulty when they were in proper order, as all the evidence clearly shows. There was at no time any insurmountable difficulty in obtaining water through this first aqueduct, or any difficulty, which might not have been overcome by the exercise of reasonable skill in construction, and of care and diligence in the maintenance of the work. It was, in fact, never abandoned by the testator, as his repair and use, subsequent to the commencement of this litigation proves. The whole case shows beyond all dispute that the attempt to dig a new ditch for another aqueduct, was a mere experiment to ascertain whether a new route, with the head at another spring or reservoir, could not be found which would be more convenient for the testator, and less expensive to keep in repair. This was an experiment which, under the circumstances, he had no right to make, and the defendant was perfectly justifiable in filling up the excavation, and putting an end to these roving trials for the discovery of new fountains and more convenient routes.

There was no disputed question of fact to be submitted to the jury. It was a mere question of law, upon the plaintiffs' evidence. The nonsuit was therefore properly granted. I have been unable to discover any error in the rulings upon the trial, against the plaintiffs. A new trial must therefore be denied.

[MONROE GENERAL TERM, September 2, 1867. *J. C. Smith, E. Darwin Smith and Johnson*, Justices.]

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XII Memoriam.

HON. REUBEN HYDE WALWORTH, LL. D.

THE LAST OF THE CHANCELLORS OF THE STATE OF NEW YORK ;

WHO presided in the Court of Chancery for more than twenty years, with unsurpassed learning and ability ; and who retired from that high office when the new constitution, by which the court was abolished, went into effect, in July, 1848, died at his residence at Saratoga Springs, on the 28th day of November, 1867, in the eightieth year of his age.

Ripe in years, ripe in learning and wisdom, ripe in all the social and private virtues, and ripe in Christian experience and hope, "like a shock of corn" he was ready to meet the Universal Reaper.

No extended biography of the deceased will be attempted, in this place. That task devolves upon one of his sons—a gentleman abundantly competent—who, it is understood, is preparing a memoir for the work on which he has long been engaged—"The Lives of the Chancellors."

The following brief summary, of the principal dates and events in the Chancellor's life, may, however, be useful :

Chancellor Walworth was born at Bozrah, Conn. on the 26th of October, 1789. He was the third son of Benjamin Walworth, whose grandfather (William Walworth) emigrated from England to Connecticut near the close of the 17th century, and of Apphia Hyde, the daughter of a Baptist clergyman, who was the fourth in descent, on her mother's side, from Mary Chilton, an emigrant in the Mayflower in 1620. His father was a quartermaster in the army of the Revolution. He was subsequently a merchant, at Nine Partners. In 1793, when the late Chancellor was five years of age, his father removed to Rensselaer county, in

this state, and became a farmer; owning farms at Mapletown and Hoosic, and residing finally at the latter place. He was in independent circumstances, and gave his son all the advantages in the way of acquiring an education which the times and the schools then existing afforded. Reuben H. acquired a good knowledge of the Latin language, under the tuition of his half brother, Wm. S. Cardell, who was a graduate of William's College, and an accomplished scholar. At the age of seventeen, having chosen the law as his profession, he entered the office of Joseph Russell, Esq. of Troy, and such was his assiduity and quickness of apprehension, that in two years he was admitted to practice in the Common Pleas. At one time during his clerkship, his health was so much impaired by close application to his studies that he was obliged to discontinue them, for a time; and being banished from a lawyer's office by the doctor's decree, and unwilling to waste his time in idleness at home, he sought and obtained a district school, in which for several months, in the fall and winter, he sought knowledge by teaching others. He has often been heard to say that for the purpose of acquiring self control and a knowledge of human nature, there was no situation equal to that of teacher of a district school.

In 1810 he removed to Plattsburgh, Clinton county, and the next year was appointed justice of the peace and master in chancery. In 1814 he took an active part in the stirring military events of which Plattsburgh was the scene, as an aid of Maj. Gen. Mooers. In 1818 he was appointed Supreme Court commissioner for the northern section of the state. In 1821 he was elected to congress, with Gen. Pitcher, from the double district embracing the counties of Washington, Warren, Essex, Clinton and Franklin. In 1823, at the close of his term, he was appointed circuit judge of the 4th circuit, and immediately afterward removed to Saratoga Springs. In 1828, when thirty-eight years of age, he was appointed Chancellor of the state, which position he held for the period of twenty years, and in which he achieved the very highest judicial eminence. In 1835 the degree of LL. D. was conferred upon him by Princeton College, and subsequently the same honor was bestowed by Yale and Harvard.

Notwithstanding the pressure of his judicial labors, he was actively identified with the interests of morality and religion. He was the first president of the State Temperance Society; a corporate member of the American Board of Commissioners for Foreign Missions; vice president of the American Bible Society; for more than forty years a member of the Presbyterian church, and for a long period one of its elders.

In 1812 Chancellor Walworth was united in marriage with Maria

Ketchum Averill, daughter of Nathan Averill of Plattsburgh. This estimable lady, who died in 1847, was the mother of two sons and four daughters, all of whom survive, except one daughter, who died at the age of five years. In 1851 he married Mrs. Sarah Ellen Hardin, the widow of the gallant Col. John J. Hardin, of Illinois, who survives him. One child, a boy, the issue of this marriage, died in early years.

At a meeting of the Bar of Saratoga county, held at Saratoga Springs, December 3, 1867, called to pay respect to the memory of the late Chancellor Walworth, Hon. Wm. L. F. Warren was called to the chair, and Hon. George G. Scott was appointed secretary. Judge Warren on taking the chair made the following address:

GENTLEMEN: We have assembled to show due respect for the memory of one of the most distinguished members of this community. Chancellor Walworth is no more. He died at his residence in this village on the day of our National Thanksgiving, amidst the festivities and solemnities of a nation's praise and gratitude to the God of our blessings, and the Dispenser of life and death. By this unexpected Providence we are called to mourn the departure of one distinguished for high virtues, eminent for the public positions he has occupied, as well as beloved in the social and domestic circles he once so well adorned.

Chancellor Walworth was born in the state of Connecticut in the year 1789. He was engaged on his paternal estate until the age of seventeen years, in the duties of a practical farmer. Having acquired in those years of comparative repose, a relish for literary pursuits, his leisure hours were devoted to that end, and soon thereafter he determined to appropriate his time and energies to the attainment of the legal profession. He entered the law office of Joseph Russell, Esq. of the city of Troy, in which he completed the legal course of study, and commenced the practice of law in the year 1811, at Plattsburgh, in this state. In 1821 he was elected to congress, and represented that district for two years. He was a resident of Plattsburgh during the war of 1812, and when the invading army sought to obtain possession of that place, Mr. Walworth took an active and distinguished part in its defense.

On the adoption of the state constitution of 1821, which overthrew the old organization of the judiciary, an entire new appointment of judges succeeded. The state was divided into eight judicial districts, and Mr. Walworth was appointed judge of the fourth, which office he occupied until April, 1828, when by the death of Governor Clinton the office of governor devolved on Lieut. Gov. Pitcher, under whose administration he was appointed to the office of Chancellor, at the age of thirty-eight

years, and continued in that office until it was abolished by the constitution adopted in the year 1846.

Previous to the new organization of the judiciary in 1821, the practice of the Court of Chancery was principally limited to a few members of the profession residing in the capitol and in the metropolis of the state. The rules and practice of that court were almost entirely unknown, and might be called a sealed book to the lawyers residing elsewhere. But under the new system of 1821, which conferred equitable jurisdiction on the judges of the several districts, the practice of the Court of Chancery was greatly extended in all the interior counties of the state; the business of the courts was largely increased, and the knowledge and practice of equitable jurisprudence became familiar to the profession generally. With the new facilities then opened to the profession, the business of the court was proportionally enlarged. Without the advantages of a classical education, and with little experience, as a chancery lawyer, but with powers of mind of no ordinary energy and discrimination, and with long established habits of perseverance and industry, Chancellor Walworth entered at an early age on his judicial career; and during the period of twenty years he heard and decided cases probably more in number and involving amounts in value far exceeding the labors or decisions of either of his eminent predecessors. His decisions have been collected and embraced in fourteen volumes of Paige and Barbour's reports, distinguished by much learning and ability, and fully sustaining his high reputation as a jurist, and are received in the several courts of law and equity in the United States and in foreign states, as reliable authority on the points of law therein discussed.

In his retirement to private life, Chancellor Walworth, though relieved from the severe labors which had so long taxed the energies of his mind and constitution, did not wholly relax his habit of laborious study. He was found regularly in his office during the hours of business, and often at night until the early hours of the day following. He was mostly employed in professional engagements, but found time from the cares of business to devote attention to his library and the preparation of various manuscripts and compilations, some of which are already publicly known.

Those most acquainted with Chancellor Walworth will remember the virtues which adorned his private life. He was cheerful and companionable in his daily intercourse, kind and benevolent to those in need of his assistance, charitable to the distressed at home and abroad, sympathizing with the oppressed, and ever ready to extend the hand of relief to the victims of want and suffering, as occasion offered. He was, moreover, a Christian man, and a ruling elder in the Presbyterian church of this

village. He was ever the friend of the cause of Temperance, and its constant and earnest advocate. His integrity and uprightness, both in public and private life, which so much distinguished his earthly career, have never been questioned. But he has gone to the retributions of another world.

Imitating this example, and practising the virtues which gave distinction and success to our departed friend, may we "live the life of the righteous and our last end be like his."

The chair then appointed Hon. George G. Scott, Hon W. A. Sackett, Hon. Alembert Pond, Hon. Edward F. Bullard, Henry W. Merrill, Esq. John R. Putnam, Esq. and John Newland, Esq. a committee to prepare resolutions expressive of the sense of the bar of this county upon the loss the country has sustained in the death of our distinguished fellow citizen, the late Chancellor Walworth. Hon. George G. Scott, chairman of the committee, reported the following resolutions:

Resolved, That in the death of the late Chancellor Walworth the country has sustained the loss of one of its most upright, enlightened and distinguished citizens, for whose public and private character we, in common with this entire community, cherish the most profound respect. That as a jurist he had few equals, and as a citizen and friend he was without guile and without reproach. And that we, members of that profession which engrossed the labors of his life, and in which he rose to such eminence and distinction, with saddened hearts pay this last tribute of our respect to his virtues, his talents and his worth.

Resolved, That as circuit judge, as chancellor of the state, as a member of the court for the correction of errors, through a long and eventful period of our history, he justly occupied a first rank among the great jurists of America. That his opinions and decisions are among the most learned, profound and thorough to be found in the history of the past. Exalted in character, pure in all his purposes, of great service to the state, to the administration of the law, full of years and of honors, he goes down to the grave leaving a distinguished record, and a great name, as an enduring monument to the country he loved so well.

Resolved, That in his example we see the force of moral power, untiring industry and unconquerable energy, developing and directing great powers to honorable ends. Beginning without advantages, cultivated without schools, he won for himself advantages, was to himself a school, that bore him upward and onward to a high rank of attainment and influence.

Resolved, That we more sensibly appreciate the importance of this occasion when we reflect that the late Chancellor constituted the chief connecting link between the present and former judicial history of New York, and that a state court of the highest original jurisdiction, which was transplanted here from the mother country at an early period in our colonial existence, terminated in his person.

Resolved, That we, the members of the bar of this county, in which the deceased has resided for almost half a century, avail ourselves of this

occasion to express our admiration of his character as a lawyer, as a judge, and a citizen.

Resolved, That we tender our sympathies to his widow, children and immediate relatives in their great bereavement.

Resolved, That we will attend in a body the funeral of the deceased, and wear the usual badge of mourning for thirty days.

Resolved, That the proceedings of this meeting be published, and that a copy be furnished to the widow and family of the deceased.

Judge Scott then addressed the meeting as follows :

MR. CHAIRMAN : The members of the bar of this county are convened upon no ordinary occasion. It is not extraordinary that an individual, who has survived, by almost a decade, the limit which the Psalmist has allotted to human life, has paid the debt of nature ; but this is an occasion, the like of which cannot again occur. We are assembled to pay the last tribute of respect to the last chancellor of the state of New York.

But a few weeks after the expiration of the seventeenth congress in which he was a representative from the Clinton district, the deceased was appointed, upon the nomination of Governor Yates, circuit judge of the fourth circuit. That circuit consisted of the present fourth judicial district, with the exception of Schenectady. The office to which he was thus appointed was a new creation of the second constitution, which went into full operation at the commencement of the year 1823. Under the previous constitution the Supreme Court consisted of a chief justice and four associate justices. Those judges not only sat in bank, and held the circuit courts, and presided in the courts of oyer and terminer, but were also, in conjunction with the chancellor and the senate, members of the court of last resort. For the purpose of relieving the chancellor and the judges of the Supreme Court from the accumulating business before them, the new constitution provided for eight circuit judges, and conferred upon them equity powers ; whereby the members of our profession generally throughout the state, as you have already remarked, Mr. Chairman, for the first time became conversant with equity practice.

Upon his appointment to this office, Judge Walworth removed to this county, where he has ever since resided, embracing a period of almost forty-five years.

To say that he succeeded in his new position, would but feebly indicate the distinction which he attained. He won the approbation of the bar—then composed of such lawyers as Thompson, Cowen, Viele, Huntington and Livingston, of this county, and Cady, Shipherd, Buel, Crary and Ross in other counties of the district. But, what was of far greater importance, he secured, in an eminent degree, the respect and confidence of the people ; for they perceived in him, an able, conscientious, humane

and business dispatching judge. I feel warranted in saying—and it is upon good authority—that as a *nisi prius* judge, he has never been excelled in this state.

In 1828, a vacancy having occurred in the office of chancellor, by the resignation of Chancellor Jones, Lieut. Governor Pitcher, who in February preceding had become acting governor, upon the demise of Governor Clinton, and who had served with Judge Walworth in congress, nominated him to the chancellorship. His nomination was promptly confirmed by the senate, and he accepted the appointment. In this new and difficult position, from the anticipated labors and perplexities of which the members of the Supreme Court, Savage Sutherland and Woodworth, shrunk, but which he readily mastered, the deceased continued until 1847, when the Court of Chancery was abolished, and law and equity were blended (or sought to be blended) into one system. He was appointed circuit judge at the early age of thirty-three, and was only thirty-eight when he took his seat as chancellor. I attribute his success, in no small degree, to his early elevation to the bench. The mental discipline of the lawyer differs essentially from that of the judge, notwithstanding their explorations are in the same field. The lawyer has his eye upon one side of the case, and all his faculties are marshaled to present it in an aspect the most favorable to his client, and to damage that of his adversary. His effort is to succeed, whether right or wrong. For this he has been retained. But the aim of the judge is to arrive at the truth. He carefully examines and sifts the evidence, applies the appropriate legal tests and principles, and poises the scales of justice with an impartial hand. "Just as the twig is bent, the tree is inclined." The habits of years, whether of mind or body, it is difficult to eradicate. Kent, Spencer, Sutherland and Nelson—some of the most distinguished names that adorn our judicial annals—took their seats upon the bench at an early age, and while their minds were yet in a plastic state. On the other hand, those giants of the bar, who, having passed their meridian, have been invested with the judicial robes, do not, perhaps, as a general rule increase, but rather diminish their stature by the change. Their intellectual vigor may not have abated, but it has been diverted into a new sphere. The old habits will return, and not unfrequently the judge is unconsciously transformed back into the advocate—to the dismay of at least one of the counsel, and the grief of his client.

An incomplete record of the late Chancellor's juridical labors fills fourteen volumes of chancery reports, and makes up a portion of the thirty-eight volumes of Wendell, Hill and Denio, containing the reported cases decided in the court for the correction of errors. All these attest the

indefatigable labor, the varied and extensive learning, the intellectual power, and in fine the consummate judicial qualities of Chancellor Walworth. They will constitute a monument to his memory more durable than brass or marble. His fame as a jurist is not confined to the limits of our own state. It has extended to our sister states—and wherever the common law and equity jurisprudence of England bear sway, his opinions are cited as authority.

In seconding the resolutions, Mr. Sackett said:

Death, in all its forms, is a terror to our race. But the life of the great and the good, ripened into length of years, assuages its grief. The lamented dead passed all the stages allotted to man, to his more than three score years and ten, in the full vigor of his body and mind, and sleeps in his final rest at the close, amid the blessings of the good, with the blessed of other days.

Chancellor Walworth was one of the marked men of his time. He began life without advantages; and won for himself distinction by the force of his own energies. In his early years he received but limited aid from schools, but, with an industry rarely equalled, he was to himself a school, that secured to him, as a whole, a high order of attainment. He entered public life in 1821, as member of congress from what was then the 17th congressional district of this state, composed at that time of the counties of Clinton, Essex, Franklin, Warren and Washington. In 1823, at the age of thirty-two, he was made circuit judge of the fourth judicial district, and in 1828 appointed chancellor of the state. As circuit judge he was regarded as eminently qualified for the discharge of his duties, and assumed, in the public estimation, a high rank among the eminent judicial minds of those times. His impartiality, his integrity, and his acknowledged legal ability, won for him a distinction, as judge and as a man, that placed him high on the roll of fame. In latter years I have frequently talked with him of those times. The public that then admired him little knew the hardships he endured in passing this first ordeal of his judicial renown. He really, at that time, had but little experience in the world, in the field of letters, or of the law, and when called to pass upon the learned and intricate points of judicial debate, presented by the great leaders in legal erudition and fame, he frequently felt oppressed by a sense of his own want of attainment. But with a native good sense, native powers of the highest order, legal aptitude, and an indomitable energy that knew not how to fail, he met every emergency, surmounted every difficulty, pressed on in every department of his profession, accumulated learning, expanded his powers into a wide field of attainment, until he

covered the weakness of the past with a rich and cultivated growth of legal accomplishment.

As chancellor the deceased opened up a new page in our judicial history. Before his time the Court of Chancery had passed into our system of jurisprudence as little more than an unknown book of equitable powers, from English precedent. He opened its pages to the public view. I but state the truth of history in saying that before his appointment there were but very few lawyers in the state who pretended to have any knowledge of chancery practice. There were no rules, no forms, no known practice. He at once set about reducing the powers of that great tribunal to practical use, and to introducing a knowledge of its formulas to the bar, to the student and to the courts. And to-day, that wide spread knowledge of equitable rights and practice, that has so universally imbued the profession with learning and experience, upon rules and rights in equity, must be mainly attributed to Chancellor Walworth. In the exercise of the high and responsible duties of his great office, embracing within its powers almost unlimited control over the property of millions, no man ever questioned his integrity, accused him of partiality, or doubted his intention to secure exact justice to all. He was Chancellor for twenty years, during a most eventful period of our history; passed in review many of the great questions of currency, corporate and individual rights; settled the law upon many vexed questions; reviewed many errors of the past; administered private rights to the high satisfaction of an enlightened, progressive and inquiring people. I risk little in saying that he did as much to elevate, purify and distinguish the judiciary of the state, as any of the great men who have done so much to make famed our judicial history. His decisions have always been regarded as among the most learned, profound and thoroughly digested presentations of the law that our country affords. And in the pages of history "The Chancellor" will always hold a first rank among the judicial minds of America.

The mind of the deceased, in some respects, was remarkable. In quickness of perception it had scarce an equal. In reaching a correct conclusion from premises, it was true as a needle to the pole. In the process of reasoning with others, it may be said, it was defective. In other words, it reached its own conclusion with such rapidity and certainty that the views of others had been anticipated, answered or approved in advance, and he was, therefore, sometimes restive in their presentation. He saw at a glance the force of language, and could point out, with more readiness the force of words, or any want of expression to carry out the real intent of parties than any man I ever knew. He was a man of detail, and never believed in jumping at conclusions. He investigated

every question to the bottom, was ever suggestive of every contingent difficulty, that the whole subject might be brought out. And he had a laborious industry equal to the accomplishment of all these ends. To these characteristics was he much indebted for the so uniform correctness of his judicial decisions. He never feared that a great mind would be belittled by really understanding the subject.

In private life he was without guile and without reproach. He had lived in the house where he died, at Saratoga Springs, for forty-five years, and at all times commanded, from his neighbors and acquaintances, that respect and esteem which a life of public and private worth secures. For the last ten years my relations with him have been intimate and familiar: He was firm in his opinions, strong in his convictions. To the casual observer he sometimes appeared dogmatical and over strenuous, but to those who knew him well, these were but the evidences of the earnestness of his convictions. He retained his love of social life till the last, never lost sight of his acquaintances, young or old, mixed in the relations of society with all the spirit of earlier years, enjoyed parties, stories, and the company of friends, with the zest of youth. He was punctilious in the performance of his duties, paid his calls, and performed all the round of his social obligations. To the last year of his life no New Year's day passed without all his acquaintances receiving his call of the season. And on that day many a younger man has been told "the Chancellor is ahead of you." He was an example of industry. Few men, if any, in this country labored as many hours as he. He seldom retired before one and two o'clock at night, and he was constantly engaged in some pursuit. He lived a long life of Christian faith and hope, and in religious belief and worship was a Presbyterian. He was an early and firm advocate of temperance, and never violated its faith. In politics he was a Democrat of the strictest school, fully imbued with a firm belief that that party could best subserve the great interests of the country. In 1848 he was the candidate of what was then called the National Democracy, for governor, but was not elected. He never lost his taste for political discussion. On the subject of the late war he lamented its existence, and believed its causes were faults of both sides; but as war had been inaugurated he clearly saw that the country must be preserved by the force of arms. The latter years of his life were largely employed in references of important matters committed to him by the courts. In the full vigor of his powers, he brought to bear upon these subjects his industry, his integrity, his great legal knowledge. However much, in the little circle of its influence, certain personal interests, in this, may have endeavored, by persevering and vociferous aspersion, to assail his pure and spotless life,

the effort has fallen innoxious at his feet, and the correctness, justice and legal soundness of his conclusions, I doubt not, will be vindicated by the high tribunal to which they have gone for review.

Chancellor Walworth, during a long career of usefulness, was a strong arm in the power of the state. He has had much to do with the moulding of our laws and institutions, and assisted, with strong hand, to lay deep among us, the foundations of private right and security. His name will be revered among the learned and the good through the coming ages. He has left, as a rich legacy to the future, an enduring monument of light and knowledge from the judicial ermine that crowns in death a noble life with the priceless jewel of historic fame.

To us, gentlemen of the bar, he was a brother in profession, a father in the law; to his memory we pay this tribute of our respect, in remembrance of the name, the virtues, and the character of Reuben H. Walworth, who, in life, ennobled the calling we pursue.

HON. A. POND said:

MR. CHAIRMAN: Although I belong to that younger class of the legal profession, whose personal acquaintance with Chancellor Walworth was quite limited, and who never had the privilege of practicing before him while he occupied a seat on the bench; yet I am unwilling to let the occasion which has called us together wholly pass away without paying my humble tribute of respect to his memory.

There were some circumstances connected with the life of Chancellor Walworth, which, so far as my own feelings are concerned, seem to me peculiarly calculated to commend his example to the young student in our country; as an encouragement on his part to energy and application; and which at the same time illustrate the liberality and beneficence of our free institutions.

The first is the fact that Chancellor Walworth did not in early life have the advantages of influential family friends, nor of a classical education. And yet without these, he was enabled by his own unaided exertions to attain, and successfully to fill exalted public positions, and to achieve in the discharge of the duties pertaining to them, that eminence and fame, which are second to none in our state, or even in the nation. The record of his learning and ability, as well as of his purity as an upright equity judge, contained in Paige's and Barbour's Chancery Reports, will, so long as equity law itself shall exist, be a proud and lasting monument to his fame, superior to and more enduring than any that can be inscribed on marble or brass.

For the long space of twenty years did Chancellor Walworth preside in the Court of Chancery in this state, and during that long and eventful

period, the lofty character of that high tribunal for learning, justice and equity in its decisions, acquired under Chancellors Kent, Sanford and Jones, was not only fully preserved, but, if possible, still higher advanced; and the breath of suspicion or of calumny, so easily excited even against the pure and upright judge, never, while he occupied a seat on the bench, were directed either against Chancellor Walworth or his decisions. On the contrary, his opinions and decisions while Chancellor, in the authority and weight universally conceded to them, not only in this state, but throughout the Union, have equalled if not excelled those of any other American equity judge; and have not been excelled, if they have been equalled by any English equity jurist, ancient or modern.

The only other circumstance which I desire to refer to, connected with the life and judicial labors of the late Chancellor Walworth, and which I deem eminently worthy of imitation by the younger members of the profession, was his habit of untiring industry. To this, doubtless, combined with his innate sense of justice, as much, if not more than to any other traits of his character, was his success, in the discharge of the duties of his high office, mainly due. Chancellor Walworth's mind was not characterized by *brilliancy*, so much as it was by strength and high moral purpose. But it was well adapted for close, patient and thorough investigation. In the investigation of cases he left no field of truth, either of law or fact, unexplored. And his opinions in cases, both in the late court for the correction of errors and of chancery, involving questions of common law, as well as those relating to equity jurisprudence, are generally exhaustive examinations of every question involved. To these habits of patient industry, therefore, and also to that strong and pervading sense of justice and right which governed and controlled every decision he made while Chancellor, was his success as an equity judge, eminently due, as before suggested, and his example in these respects, may be justly held up, on an occasion like this, to the younger members of our profession, as peculiarly worthy of imitation by them; and which, if followed, will almost certainly, for him who, with unshaken confidence, shall in these particulars tread the same path pursued by him whose death we now mourn, ensure the same or a similar measure of approval, if not of reward.

To my mind, any man, who shall rise solely by means of his own strength of mind and integrity of character, from a comparatively humble origin, to the exalted judicial eminence achieved by Chancellor Walworth; and who wholly unaided by the factitious circumstances in early life to which I have alluded, and to which the distinction attained by many is mainly, if not entirely attributable, shall inscribe his name thus high on the roll of judicial fame, as Chancellor Walworth has done, is entitled,

while living, to the profound admiration of his compeers, and when dead to that meed of respect and veneration from those who survive him, accorded only to the just and true.

Entertaining the sentiments thus expressed, it is perhaps needless to add that I cordially approve of the resolutions which have been presented, and hope that they will be unanimously adopted.

J. P. BUTLER, Esq. spoke as follows :

Reuben Hyde Walworth had passed through many startling changes. He was an active participant in the war of 1812, in the defense of Plattsburgh, then his residence. He survived many wars, and the war of the rebellion, and in an hour of peace and quiet he died, full of years and full of honors.

It has been my habit, during the latter portion of the time since he retired from the chancellorship, to pass his office and place of residence several times a day ; and I have noticed with what untiring industry he has devoted himself to business, and to intellectual pursuits. It was, doubtless, owing in a considerable degree to this industrial element of his character, that he was enabled to erect the monument of intellectual granite that forms so conspicuous a figure in the jurisprudence of his native state. These characteristics afford a lesson and an example to all who may attempt to follow ; for

"Lives of great men all remind us
We can make our lives sublime,
And departing leave behind us
Footprints on the sands of time."

His residence at Saratoga Springs, where he lived so long, was, in its adornments and surroundings, in harmony with the mind and character of the man—simple, chaste and rural—his garden abounding with flowers, which he loved to cultivate with his own hands ; his house canopied with the rich foliage of lofty and primeval trees.

Those old and venerable trees had grown up with him, and were his counsellors, companions and brothers. They talked with him and he with them, and they now talk of him. At a time when a leaf stirred not in all their branches, in the stillness of a quiet day, an unusual commotion was heard amidst that ancient grove. There was a tremor that went through it, and a waving to and fro of its long and many fingered arms, a sharp snapping of cords, tendons and fibres at the trunk, a cleaving of the air, a breaking of giant limbs, and a crash that resounded through the forest that made the land quiver and rock.

We are here assembled to look in upon that opening ; to observe the clear sky beyond, and the mighty trunk that lies stretched upon its

mother earth; and there it will remain, in obedience to that "higher law," that "as a tree falleth so shall it lie."

When we stand by the grave of a distinguished and aged citizen, we can but feel with painful impressiveness, that a link is broken in the golden chain of memory that connects the dim and shadowy past with the realities of the present, and the anticipations of the future.

In taking a retrospective view of Chancellor Walworth's eventful life, there comes thronging up a long line of giants in the law, his co-laborers, co-workers and cotemporaries, the Weavers, the Platts, the McNeals, the Grosses, the Shepherds, the Russels, the Rosses, the Simmonses, the Storeys, the Kelleys, the Cowens, the Hills, the Cadys, the Willards, the Stevenses, the Reynolds, the Gridleys, the Spencers and the Jordans.

These are some of the men whose eloquent words were often heard in his courts, now hushed and tongueless forever. With them his name will be individually associated.

"Around us each dis severed chain
In broken ruin lies,
And earthly hands can ne'er again
Unite those broken ties."

And in conclusion, we are led to exclaim, in the language of the poet of nature:

"What a piece of work is man! How noble in reason! How infinite in faculties, in form and moving, how express and admirable! in action how like an angel! In apprehension how like a God."

P. H. COWEN said: I have been on terms of intimacy with Chancellor Walworth from my boyhood. I have known him in his public and private relations for a long series of years. His character as a citizen and as a public officer has always been marked with great ability and virtue, and with all the qualities that make up an enlightened, upright and distinguished man. He has been to me a father in advice and counsel, a neighbor full of kindness and goodness. I have met him, in former years, in the domestic and social circle, at my father's house (the late Judge Cowen) and elsewhere, as a compeer and companion of the distinguished men of those times, Silas Wright, Martin Van Buren, William L. Marcy and the late Chief Justice Savage, who, one and all, upon all occasions, paid the most profound respect to his opinions, the greatest deference to his suggestions and views. The recollections of those scenes of other days, when these great men held the reins of power, are among the pleasant memories of the past. I long since learned to revere the character of the departed, and to love him as a man. I pay this tribute of

my respect to his memory in sorrow and sadness, but with a relief likened unto joy, that what is our loss is his gain.

H. W. MERRILL, Esq. said he could not allow the occasion to pass without expressing his approval of the sentiments contained in the resolutions under consideration. He regarded them not simply as complimentary and customary in kind, but as truthful in the fullest sense of the terms employed. The numerous cases reported in books referred to by the gentlemen who have spoken, do indeed give conclusive evidence of the great labor and varied legal knowledge of Chancellor Walworth; but it should be remembered that these cases do not indicate all his labors. A large number, probably a majority of the causes and proceedings which were thoroughly examined and decided by him, have never been reported. If these unpublished cases were collected together they would fill many volumes, which, together with those now in the books, would show herculean labor, and an amount of knowledge, both legal and equitable, and medical jurisprudence truly wonderful.

As history teaches by examples, so one of these unreported cases may serve to illustrate the importance of many others, and show what deference was given to his opinions by those highest in authority. The case referred to, is that of the People against Abraham Wilcox. It arose in this county, and was briefly as follows: In the fall of 1845, at a farm house, one mile from the village of Schuylerville, Wilcox stabbed one Samuel McKinster with an ordinary jack knife, inflicting several wounds, of which he soon after died. The deed was done in open daylight, in the presence of several witnesses, without warning and without provocation. Wilcox was indicted for murder, and was tried in the court of oyer and terminer, held at Ballston Spa in May, 1846. Judge Willard was the presiding judge, and the Hon. Wm. A. Beach district attorney. The defense was monomania, and there was evidence, both of a *physical* and *mental* character, tending to establish it, but the jury rendered a verdict of "guilty," and with strange inconsistency recommended him to the mercy of the court. On the 4th day of June following, he was sentenced to be hung. As the law then required, Judge Willard, soon after, transmitted to the governor a copy of his minutes of the evidence taken on the trial, with the verdict of the jury and sentence of the prisoner. A petition signed by all the jurors except one, and by several others conversant with the facts of the case, was presented to the governor, praying that the sentence of death might be commuted to imprisonment, on the ground that they believed Wilcox to have been deranged when the fatal act was committed. On these papers the governor submitted the case to his legal advisers, consisting of the judges of the Supreme Court and the Chancellor.

All the judges, looking at the case from their law stand point, gave it as their opinion that there was nothing in the evidence calling for, or justifying the exercise of executive clemency. But the Chancellor, after a careful examination of the facts and evidence, came to the conclusion that Wilcox was *deranged*, and advised a commutation of the death penalty for imprisonment. This result was unquestionably owing to his more patient investigation and his superior knowledge of medical jurisprudence, and of the manifold developments of the mind in a diseased condition. That great and good governor, Silas Wright, gave heed to the Chancellor's opinion, and commuted the sentence, and Wilcox went to the state's prison instead of the gallows, and the administration of justice was saved from another stain, and the cause of suffering humanity was vindicated. The governor, in pardoning, referred to the opinion of the law judges, remarked that his own judgment mainly coincided with theirs, but inasmuch as the Chancellor thought otherwise, there was ground of reasonable doubt, and he would give the prisoner the benefit of the *doubt*.

HON. JOHN C. HULBURT addressed the meeting as follows:

MR. CHAIRMAN: After the elaborate and eloquent remarks of the gentlemen who have already addressed you, it would seem to be surplusage to add more to what has been so well and justly said. But I should do injustice to the lively sympathy and approbation which I entertain for the resolutions presented for our consideration, if I gave them no more than my silent acquiescence.

The members of the bar of the county of Saratoga assemble here to-day, as they have on other occasions, to express their respect for the memory of a deceased brother, and to tender their sympathy to his bereaved family. On no occasion, however, have they thus assembled to give that expression, and to tender that sympathy on the death of one of their number, who in his life had attained the exalted and honored position of our brother in the profession, the late Chancellor Walworth. From the humble walks of life our deceased brother rapidly arose to the front ranks of the profession, and from that position he was early called to the discharge of the duties of circuit judge and vice-chancellor, and then of chancellor, a position more honorable and responsible than any to which the state of New York can now call any one of its citizens. An allusion has been made to the fact that he was at one time a candidate of one of the political parties for governor of the state. The impartiality and capacity which he evinced as Chancellor give a guaranty that if he had been elected he would have discharged the duties of governor acceptably to the people. But, however acceptably (in my judgment) he would not have added to the fame and renown that he had already acquired as

chancellor, nor by his election would the state have conferred on him as great an honor and distinction as he had already received from her hands. After the Court of Chancery was abolished by the present constitution, Chancellor Walworth again took and maintained his place as a member of our profession, and continued in the discharge of its duties in the higher branches, until disabled by his last sickness. In the discharge of the duties of the respective positions which he held, he adorned and honored them by bringing to their performance untiring industry, unbending integrity, exhaustive learning, and high mental endowments. I can say, in truth, that the history of our jurisprudence for over twenty-five years is essentially the history of the late Chancellor. Our Supreme Court and equity reports attest how great were the duties imposed on him as circuit judge, vice-chancellor and chancellor, and how faithfully and ably he discharged those duties. As chancellor he defined and elucidated principles in the administration of equity, which he adopted for his own court that are now cardinal rules, not only for the courts of this state, but the courts of other states and governments, and will continue to be followed as long as courts of law and equity shall not cease to give to parties relief from fraud and injustice.

As arduous as were the judicial and professional labors of the Chancellor, his love and zeal for the order and the good government of society enabled him to find time to give to the State Temperance organization, and to societies organized for the dissemination of the gospel, his personal efforts in the performance of official duties therein. He also gave to these organizations large pecuniary aid.

In contemplating the life of public service of Chancellor Walworth all will cheerfully give him this meed of praise: "The world is greatly benefitted by that life and service." In conclusion, Mr. Chairman, I heartily concur in the resolutions.

Mr. BULLARD made a most feeling address, presenting many interesting points in the history of the lamented dead, and in connection with his personal knowledge of his worth and services to the country. He recounted many incidents of interest connected with his practice before him in the Court of Chancery, his political principles, and his private worth. He said in all his relations of life, public and private, the Chancellor had been without reproach, and that his service as Chancellor of the state was distinguished for its ability, its learning, and the universal estimation of its legal strength and clearness.

Mr. POND, on behalf of Judge BOCKES, said that he would have been present had he not been unavoidably detained at home by severe illness.

He desired to mingle his feelings of respect and veneration for the lamented dead with those of his brethren of the bench and bar.

JOHN R. PUTNAM, Esq. made a few appropriate remarks, and read a letter from Hon. Charles O'Connor, expressing respect for the deceased.

SILAS P. BRIGGS, Esq. made a few remarks, dwelling particularly upon his Christian character.

The resolutions were then unanimously adopted.

The bench and bar of New York city also held a meeting in the Supreme Court room, to express their sorrow at the death of the late ex-Chancellor Walworth. Justice Ingraham presided. A series of resolutions commemorative of the virtues of the deceased were passed, and eulogistic addresses were made by Daniel Lord, James W. Gerard and Charles O'Connor, Esquires. The proceedings of that meeting, it is believed, have not been published, and the reporter has been unable to procure them.

NOTE.

The statement of facts prefixed to the case of *The Hicksville and Cold Spring Branch Railroad Company v. The Long Island Railroad Company*, (48 Barb. 355,) was taken by the reporter from the points of the appellants' counsel, the respondents' points and printed case being voluminous. The reporter had no design of giving his own judgment as to what the facts were; and certainly not in any degree in opposition to either the findings of the facts as certified by the judge who tried the case, or to the view of them taken at the general term, but rather to secure brevity, and to take such as were admitted by the counsel who approved the result.

INDEX.

A

ACTION.

A right of action, for wrongfully and without permission, raising ores and minerals from lands situate in another state, belonging to another person, and selling and converting them, is assignable, and may be prosecuted in the courts of this state, by one to whom the owner has assigned such ores and minerals and all claim for their wrongful conversion. *Hoy v. Smith*, 860

See TOWNS.

AFFIDAVIT.

See CRIMINAL LAW, 5.
PRACTICE, 8, 5.

AGREEMENT.

1. Construction and effect.

1. In February, 1864, the plaintiff and defendant entered into a written agreement, by which the former agreed to deliver, at a railroad station, a quantity of lumber, and the latter agreed to pay a specified price for such lumber, on delivery. In pursuance of this agreement, the plaintiff transported and deposited at the place of delivery a quantity of lumber, but it was not measured

or inspected, and the defendant was not there to receive it and to make payment. On the 6th of September, the parties met and examined the lumber, when the plaintiff, by reason of the defendant's delay in receiving and paying for the lumber, refused to deliver it, upon the contract. The parties then entered into another contract for the sale of the lumber, whereby the defendant agreed to pay, and the plaintiff agreed to receive, an enhanced price for such lumber, and for the purchase and sale of other lumber. *Held* that the new contract was not a parol alteration of the former written contract, but it was in substance and effect a new contract in lieu of the former one which the plaintiff refused to perform; and that it was valid, and would support an action. *Keeney v. Mason*, 254

2. *Held, also*, that such new contract having been executed, by the delivery of lumber upon it, and the payment of money, by the defendant, and a promise to pay the balance, it was too late for him to recede from it, or to object to its validity. *ib*

3. By an agreement between the parties, dated February 11, 1861, reciting that they had agreed to continue the connection between them for three years from January 1, 1861, in the same way as theretofore, it was stipulated that the arrangement made with the plaintiff was to share

- the profits or losses of the defendants' business in the above mentioned time, at the rate of 17½ per cent; but that it was not to convey to the plaintiff the right of partnership in the defendants' firm, of signing the name of the firm, &c. and that he was to superintend as salesman the department of general dry goods; that the plaintiff should be at liberty to draw \$2500 a year in monthly installments, for his personal and other expenses; that the capital then standing to his credit on the books of the firm, as well as the surplus of profits for the next three years, if any, should remain in the business, to his credit, at seven per cent interest during the term of the agreement; that in case of the death of either of the defendants, during the three years, the agreement was to remain in force with the surviving partner if he should continue the business; and that in case of the death of the plaintiff, the books of the firm might be balanced either on the 31st of December, or 30th of June, whichever date might follow after his death, and the balance found due to him should be paid to his representatives. *Held*, 1. That whatever might be the character of the parties in respect to creditors or others, as between themselves they were not copartners. 2. That the provision in the agreement, that in case of the plaintiff's death, the books of the firm might be balanced either on the 31st of December, or 30th of June, excluded the idea that they should be balanced at any other time within the three years. 3. That as the accounting was not to be made until the expiration of that period, the profits and losses were to be calculated upon the whole, and not upon any fractional part of it—not upon every year, or month, or week within it; but that the gross profits and losses of the specified term of the contract were to constitute the elements of the accounting. *Osbrey v. Reimer*, 285
4. Accordingly *Held* that the conclusion of the referee, "that the defendants had no right to charge the plaintiff interest on losses for the first year, nor to reduce the amount loaned them by the plaintiff, in consequence of such losses," was correct. *ib*
5. On settling and arranging a partnership loss between the parties, the sum of \$35 was found due from the plaintiff to the defendants. It was, thereupon, mutually agreed between them, *by parol*, that this sum should be *applied* upon a demand the plaintiff had against the defendants, and the demand *cancelled*. Nothing beyond mere words passed between the parties, and although a receipt for the plaintiff's demand was to be given, none was ever executed. *Held*, that the agreement was void by the statute of frauds. (*INGALLS, J. dissented.*) *Brand v. Brand*, 346
6. An application of one demand to the payment or extinguishment of another, not proved by any act of the parties, cannot be claimed as legally flowing from a parol agreement that such application shall be made. *ib*
7. By a contract between the parties, the defendants agreed to procure fifty cotton warps to be manufactured, and to sell and deliver them to the plaintiff, at a specified price, to be paid on delivery. The defendants delivered 28 of the warps to the plaintiff, and procured the remaining 22 to be manufactured, but instead of delivering them to the plaintiff, they sold them to another person, at a price exceeding that which the plaintiff agreed to pay, and used the proceeds. In an action by the plaintiff, to recover such excess, the complaint alleged the transaction to be a sale by the defendants of warps belonging to the plaintiff and delivered to the defendants as his agent, to sell on his account. *Held*, 1. That the contract was executory, and under it the title to the warps did not pass to the plaintiff, till delivery. 2. That without title to the 22 warps, the plaintiff could not adopt the sale made by the defendants, as his own; his only remedy being for a breach of the executory agreement to deliver them to him. 3. That he could not recover in this action, with the complaint in its present form, without establishing an express agreement by the defendants to sell the warps on his account. *Sharp v. Simons*, 407
8. Where the plaintiff loaned to the defendants \$10,000 in gold, and the

latter agreed to repay the loan in gold, and repeatedly, afterwards, promised to return gold to that amount; *Held* that the act of congress, commonly called the legal tender act, did not apply to the transaction; and that the plaintiffs were entitled to damages for a breach of the contract in not returning the \$10,000 in gold. (WELLES, J. dissented.) *The Bank of the Commonwealth v. Van Fleet*, 508

9. *Held, also*, that the plaintiffs had not released the defendants from the obligation of the contract, by receiving from the latter their check for \$10,000, on which they received the money in legal tender notes, crediting the check to the defendants in their general account; where it appeared that the check was received as a deposit, like any other deposit, and that the plaintiffs did not intend, by receiving it, to satisfy or discharge the defendants' obligation under the contract. *ib*

10. Where a person, since the passage of the legal tender act, promises, for any valid consideration to return gold or silver, instead of the national currency, he is bound to return those specific things, precisely as he would be bound to return a specific quantity and quality of cotton, if he had, for a valid consideration, promised to do so. *Per CLERKE, J.* *ib*

2. Proof of.

11. Although a complaint sets out an express agreement, it will be sustained by evidence of an implied one. *Smith v. Lippincott*, 398

12. An implied agreement to pay for materials, &c. when not inconsistent with an existing written agreement between the parties, is admissible in evidence and will sustain an action to recover the value of such materials. *ib*

3. Validity.

13. An agreement by the supervisor of a town to pay a stipulated sum to another, in consideration that the latter will recruit and furnish for the former, and for his town, a certain number of three years naval recruits, or the credit of the same duly made, which sum exceeds the rate of \$600

for each man, contravenes the provisions of section four of chapter 29 of the laws of 1865, forbidding the payment of bounties above the amount therein prescribed, and is therefore void. *Powers v. Shepard*, 418

14. The fact that such a contract is not made with a volunteer, nor for the payment of bounties, will not authorize a recovery thereon. The policy of the law is destroyed by permitting contracts for procuring volunteers by the payment, to any one, of an amount beyond the sums prescribed by the act for bounty and hand-money. *ib*

4. Changing or reforming.

15. If a written contract, by reason of any mistake of fact, does not express the agreement, in fact, a court of equity may reform and correct it by decree, in a direct action for that purpose; but it cannot be changed or reformed by parol evidence, in an action at law arising upon an alleged breach of such contract, in which the plaintiff seeks to recover damages only. *Bush v. Tilley*, 599

16. If an alleged previous oral arrangement is declared upon, as the subsisting agreement, the subsequent written agreement duly executed, the moment it is presented in evidence, destroys the oral one, and takes away its character as an agreement, entirely; and no amount of parol evidence can give it force or vitality, as against the written version. The written version must be changed, or the contract must stand and be performed as first written. *ib*

See NEW YORK (CITY OF.)

AMENDMENT.

Where the cause of action alleged is the breach of a subsisting contract between the parties, and the relief asked is a judgment for the amount of damages sustained, leave to amend the complaint, so as to convert the action into one of equitable cognizance, to reform a written agreement, should not be granted, on the trial. *Bush v. Tilley*, 599

ANSWER.

1. Where an answer alleged that it was agreed between the defendant and the plaintiff upon her purchasing goods of them, "that she was to make payments, from time to time, as she could, out of her business, and from the proceeds of the sales" of the goods; *Held*, that it was erroneous for the judge, at the trial, to construe the answer as meaning that the defendant was to make payments, from time to time, as she *conveniently* could. *Johnson v. Plowman*, 472
2. *Held*, also, that it was erroneous for the judge to charge the jury that if they believed that the defendant purchased the goods with the understanding that she should pay for them when convenient, and that it had not been convenient for her to pay, before the action, they should find for the defendant. *ib*
3. Upon such an answer, the burden of proof is with the defendant. *ib*

APPEAL.

On appeal to the county court from a judgment of a justice's court, the county court should disregard errors of the justice not affecting the merits, and give judgment according to the justice of the case. *Owings v. Nichols*, 145

See LANDLORD AND TENANT, 1, 3.

APPURTENANCE.

See LEASE, 2.

AQUEDUCT.

See GRANT.

ARBITRATION AND AWARD.

1. A party cannot enter a judgment upon an award in his favor, unless the submission, pursuant to which it was made, be in conformity with the statute respecting arbitrations. Nor can any judgment be entered on an award, under the statute, until the

submission be proved by the affidavit of a subscribing witness thereto. *Goodell v. Phillips*, 353

2. If there is no subscribing witness to the submission, so that the plaintiff cannot comply with the requirement of the statute, he is not entitled to a judgment upon the award. *ib*
3. And if the plaintiff applies for judgment upon the award without notice to the defendant, the latter will not waive the objection that the submission was not proved by the affidavit of a subscribing witness, by not opposing such application. *ib*
4. Nor will he waive the objection by taking part in the proceedings before the arbitrators, knowing that there is no subscribing witness to the submission; nor by omitting to move to vacate, modify or correct the award. *ib*

ASSAULT AND BATTERY.

See LANDLORD AND TENANT, 5.

ASSESSMENT.

See STREETS, 1, 5 to 8.

ASSIGNMENT.

Of course of action—See ACTION.
For the benefit of creditors—See DEBTOR AND CREDITOR.

ATTACHMENT.

See SHIPS AND VESSELS.

B

BAGGAGE.

See CARRIERS.
RAILROAD COMPANIES, 1 to 5.

BOARD OF HEALTH.

See METROPOLITAN BOARD OF HEALTH.

BONA FIDE HOLDER.

See PROMISSORY NOTES, 1, 2, 3.

BOND.

See RECEIVER.

BOUNTIES.

See AGREEMENT, 13, 14.

BRIDGES.

See RAILROAD COMPANIES, 6, 7, 8, 11,
15, 16, 17, 21.

BROKERS.

See STOCK.

BROOKLYN (CITY OF.)

1. Where it is doubtful whether a person in whose favor a warrant is drawn upon the treasurer of the city of Brooklyn, by the comptroller, is entitled to the money, there being another claimant, who has sued the city therefor, the mayor is not obliged to sign the warrant; and cannot be compelled to do so, by mandamus. *The People ex rel. Duff v. Booth*, 81
2. There is nothing in the charter of the city, or in the general statutes of the state, authorizing the comptroller to adjudicate the question of title to the money, in such a case; and the mayor is not controlled by his action, and bound to sign the warrant as a mere ministerial act. *ib*

See WHARF AND WHARFAGE.

C

CARRIERS.

1. Common carriers of goods may, by express stipulation, limit their liability for the loss of goods occurring from even the negligence of their

agents and servants; or wholly exempt themselves from such liability; and the acceptance by the bailor, from the bailee, in the ordinary course of business, of a receipt for the goods containing such a stipulation, creates a binding contract. But the liability of the carrier will continue, as established by the common law, in respect to all matters not expressly stipulated against. *Prentiss v. Decker*, 21

2. The putting into the hands of a passenger, on receiving her baggage for delivery at her residence, of a card containing a clause limiting the liability of the carrier to a specified amount, except by special agreement, to be noted on such card, will not, without further proof from which the assent of such passenger to the terms thereof may be implied, establish such a contract. *ib*

3. Such a contract relates only to the carrier's liability as an *insurer* of the goods, and imparts no exemption from liability for actual negligence. And it applies only to deliveries to railroads and steamboats. The legal title to wearing apparel and jewelry, provided by a father for the use of his infant daughter, remains in him, notwithstanding the possession of them by the infant. And for the purposes of an action by the father against a common carrier, to recover for the loss of such property, the daughter must be treated as the legally constituted agent of the plaintiff. *ib*

4. A common carrier cannot limit his liability by a memorandum or note on the card or ticket which he delivers on the receipt of goods to be transported by him. *Linsburger v. Westcott*, 283

5. Thus, where, by a memorandum on a receipt for baggage, issued by an express company, it was stated that the "liability" of the company was "limited to \$100, except by special agreement to be noted" thereon; *Held* that in the absence of any knowledge by the owner of the baggage of such condition there was no consent to it by him, and no bargain between the parties, limiting the liability of the company. *ib*

See RAILROAD COMPANIES, 1 to 5, 11, 12.

CASES APPROVED, COMMENTED ON, OR DISTINGUISHED.

1. The decision in *Richardson v. Abendroth*, (48 Barb. 162,) approved. *Williams v. Wadsworth*, 294
2. *Aiken v. Watson*, (24 N. Y. Rep. 482,) distinguished from the present case. *ib*
3. The case of *Davis v. Spencer*, (24 N. Y. Rep. 386,) commented on, and distinguished. *Brand v. Brand*, 346
4. The decision in *The People v. The Board of Metropolitan Police*, (38 How. Pr. 52; 48 Barb. 524,) approved. *Schuster v. The Metropolitan Board of Health*, 450
5. The rule as to the effect of former actions as a bar, laid down in *Phillips v. Berick*, (16 John. 140,) approved. *McIntosh v. Lown*, 560

CERTIORARI.

1. The office of a certiorari is to bring up the record of the proceedings sought to be reviewed; and it is properly directed to the officer or body having the legal custody thereof. *The People ex rel. Reynolds v. The City of Brooklyn*, 136
2. Where the return of a city corporation to a writ of certiorari to remove proceedings for the widening of a street shows that the report of the commissioners, annexed thereto, contains a recital of the proceedings by which they were appointed; or a certified copy of such proceedings is appended thereto; the petition for the appointment of commissioners, and the order appointing them, form constituent parts of a single record, which is legally in the custody of the city corporation; and they are, by the return of such corporation, brought before the court, as fully and directly as any other part of the same record. *ib*
3. Any error in the direction of a writ of certiorari, or in the return thereto, must be corrected by motion. All objection on the ground of such irregularities, is waived by submitting to a hearing on its merits. *ib*

CHATTEL MORTGAGE.

See REVENUE STAMPS, 1, 2.

CHECKS.

1. Checks drawn in the ordinary general form, not describing any particular fund or using any words of transfer of the whole or any part of the account standing to the credit of the drawer in the bank upon which they are drawn, but containing only the usual request directed to the bank, to pay to the order of the payee named, a certain sum of money, are of the same legal effect as inland bills of exchange; and do not amount to an assignment of the funds of the drawer, in the bank. *Lunt v. The Bank of North America*, 221
2. There is no liability of the party upon whom such an instrument is drawn, until after it is accepted; and until payment or acceptance, it is always revocable by the drawer. *ib*

COMPLAINT.

1. At common law, a suit was maintainable, in equity, by a wife against her husband, to recover money, the separate property of the wife, which he had wrongfully taken and converted. And the Code having abolished the distinction between equitable actions and actions at law, and the old forms of pleadings, a complaint setting forth such a state of facts and praying judgment against the defendant for the amount taken by him and converted to his own use, states a good cause of action, and is therefore not demurrable. *Hogboom, J. dissented. Whitney v. Whitney*, 819
2. It is no objection to the complaint, in such a case, that a money judgment is demanded, instead of an accounting. *ib*
3. Whatever the prayer for relief may be, the judgment of the court will be according to the facts alleged and proved. And even if the party err in the nature of the relief demanded, the court will grant it according to the facts proved. *ib*

See AMENDMENT.

CONSTITUTIONAL LAW.

1. The act of the legislature, incorporating the village of Edgewater, passed March 22, 1866, provided that there should be seven trustees, four of whom should be elected in May, 1868, and three of whom should be elected in May, 1869, who should hold their office for two years. The act also provided that four persons named therein should be trustees from the passage thereof, until the election of their successors in May, 1868, and that three other persons, named therein, should be trustees from the passage of the act until the election of their successors in May, 1869. *Held*, that the appointment of the trustees named in the act was in violation of article 10, section 2, of the state constitution. *The People ex rel. Brown v. Blake*, 9

2. The provisions of chapter 29, of the Laws of 1865, prescribing a maximum sum to be paid for enlisting soldiers, and forbidding the payment of a higher sum by cities, counties, &c. are not unconstitutional. *Powers v. Shepard*, 418

See EASEMENT.

CORPORATION.

A person employed by a manufacturing corporation as its *civil engineer and traveling agent*, at a fixed salary, is a *servant* of the corporation, within the meaning of the 18th section of the act of 1848, which makes the stockholders of such corporations personally and individually liable for debts due to their laborers, *servants* and apprentices. *Williamson v. Wadsworth*, 294

Service upon a director—*See PRACTICE*, 9.

See LEASE, 1.

COSTS.

See JUSTICES' COURTS, 3.

COVENANT.

See DEED.
LEASE, 3, 4.

CRIMINAL CONVERSATION.

1. The law is now clearly settled to be that if it appears, in an action for criminal conversation, that the husband consented to his wife's adultery, it goes in bar of the action. *Bunnell v. Gresham*, 106
2. If he was guilty of negligence, or of loose or improper conduct not amounting to a consent, it goes in reduction of damages. *ib*
3. If the husband had it in his power, and neglected to interpose, to prevent the debauchment of his wife, he can recover only the actual pecuniary damages which he sustained. (*J. F. BARNARD, J. dissented.*) *ib*

CRIMINAL LAW.

1. It is never necessary to state, in a criminal warrant, the evidence by which the charge is to be supported. All that is required, in that particular, is to "recite the accusation." *Pratt v. Bogardus*, 89
2. This requirement is satisfied by a statement which indicates with reasonable certainty the crime sought to be charged. *ib*
3. Where a warrant, issued by a justice of the peace, after stating time and place, alleged that the defendant "designedly by false pretenses, did obtain from" the complainant "one sulky of the value of \$30, the property of * * * with intent to cheat and defraud" the complainant; *Held* that this was a valid warrant upon a complaint for obtaining property by false pretenses, although the pretenses used were not set out therein. *ib*
4. Where, in issuing a criminal warrant, a justice of the peace possesses, and is exercising a general jurisdiction of the subject matter, and not a special jurisdiction over a particular offense, created by statute, and thereby restricted as to the manner of proceeding, all that is required, to protect him in so doing, is that the evidence produced is colorable—something upon which the judicial mind is called upon to act,

in determining the question of probable cause. *ib*

5. Where the affidavit, upon which application for a warrant was made, stated, in substance, that the defendant did designedly and by false pretense obtain from the complainant one sulky, of the value of \$80, by falsely stating and representing to him that his own sulky was hard to ride in, and that he desired the complainant's sulky to go to Albany, and would return it the next week, but that on the contrary he shipped it from Albany to Fort Plain, with intent to cheat and defraud the complainant; *Held* that this was colorable evidence, sufficient to call upon the justice to exercise his judgment, in determining the propriety of issuing process; and that having acted in good faith, he should be protected. *ib*

6. A general verdict, in a criminal case, is equivalent to a special verdict finding all the facts which are well pleaded in the indictment. *Flagg v. The People*, 122

7. Where, upon an indictment charging the prisoner with having committed the crime of murder in the first degree, the jury find a general verdict of guilty, the court is justified in pronouncing a judgment sentencing him to be hung. *ib*

8. A common law indictment for murder is good and sufficient, in form, to charge the statutory definition of the crime; i. e. the premeditated design to effect the death of the person killed which the statute makes an indispensable ingredient of the crime, is comprehended in the averment of a willful and felonious killing with malice aforethought. *ib*

9. On the trial of an indictment for murder, it appeared that the meeting of the accused and the deceased was casual, they having had no previous acquaintance; that the accused, taking offense at some trifling remarks made by the deceased, in passing him in the street, near midnight, stabbed the deceased with a knife, which resulted in immediate death. *Held*, that the killing, though groundless, and probably without

any intent to take life, was "by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual;" and that the evidence would have justified a verdict of murder in the first degree; but if that crime was not established, it was clearly manslaughter in the third or fourth degree. That if not one of these offenses, there was no crime committed, within the definitions of the statutes. *The People v. Sheehan*, 217

10. *Held*, also, that the offense was not within the definition of murder in the second degree, and the jury ought not to have been instructed that there was evidence upon which they could be permitted to find such a verdict. *ib*

See WITNESS, 8.

CROTON AQUEDUCT BOARD.

See STATUTES, 2.

D

DAMAGES.

See EVIDENCE, 1, 2, 3.

VENDOR AND PURCHASER, 4.

DEATH BY WRONGFUL ACT, &c.

An action for damages, under the statutes of 1847 and 1849, by the personal representative of a deceased person whose death was caused by the wrongful act or default of the defendant, is sustainable, if at all, on the same principle as if the deceased had survived the injury and was himself the plaintiff upon the record. *Warner v. The Erie Railway Co.*, 558

DEBTOR AND CREDITOR.

1. *Charges and expenses; hindering and delaying creditors.*

1. The proper charges and expenses of converting a security into money, are

first to be deducted from the gross proceeds; and it is the balance, only, which is applicable to the discharge of the debts. *Sheldon v. Rowet*, 208

2. This is especially so, when the creditor is also the factor of the goods; he having a lien for all those charges, which cannot be divested without his consent. The factor is accountable only for the balance, after deducting his charges and expenses. *ib*

8. A failing debtor has no right to interpose a legal title between his property and his debts, to compel his creditors to take notes drawn on time, in payment of those debts. *Downing v. Kelley*, 547

4. Where a debtor sold his stock of goods to his son and a clerk, taking their notes, without security, for the consideration, payable respectively at different times, from three months to three years from date, with the view of placing his property in such a situation that his creditors could not take it under legal process; and to compel such creditors to take those notes in payment of his debts; *Held* that this was a legal hindering and delaying of creditors, which rendered the transfer in judgment of law void. *ib*

2. *Assignments for the benefit of creditors.*

5. Provisions in an assignment for the benefit of creditors, directing the assignee to continue and carry on a business for the period of eighteen months, at his discretion; to sell and dispose of the assigned property, and such other articles as he may manufacture, *on credit*, or otherwise; to use the proceeds in continuing the business; to employ the assignor in the business during the continuance of the trust, at a specified salary; leaving it in the discretion of the assignor to say when the trust shall be closed; and providing for the release of the assignor, and excluding from the benefit of the trust creditors who shall object to the trust deed; are contrary to law, and render such deed fraudulent and void as against the creditors of the assignor. *Benton v. Kelly*, 686

DEDICATION.

See STREETS, 2.

DEED.

1. M. & W. were the owners of adjoining farms, that of M. lying between the farm of W. and the public highway. M. conveyed to W. a strip of land, 24 feet wide, and extending from the land of W. to the highway, by deed containing the following provisions: "The said party of the first part, for and in consideration of one dollar * * * and for the faithful performance of certain things hereinafter mentioned to be done and performed by the party of the second part, his heirs and assigns, has granted, aliened, remised, released and confirmed, and by these presents doth grant, &c. unto the said party of the second part, and to his heirs and assigns, all that certain strip of land hereinafter described, of the width of 24 feet, for a *private road*." * * * "The said party of the second part binds himself, his heirs and assigns, to and with the party of the first part, his heirs and assigns, that they may *have free and full permit to travel the said road*." The deed contained the usual covenant of warranty. *Held*; that the deed conveyed the strip of land in fee; the covenant, on the part of the grantee, securing to the grantor the right to travel upon the said road, being consistent with the assumption that the grantee was to, and did, become the owner of the land, reserving to the grantor merely the right to travel thereon. *Kilmer v. Wilson*, 86

2. Where the grantor in a deed hands the same to another with instructions to deliver it, as his agent, presently to the grantee, the delivery not depending upon any condition, as between the parties to the deed, the title passes at the time of the delivery to the agent. *Ernst v. Reed*, 867

DISCRETION.

It is a settled principle of law that where a discretion has been conferred by statute, its exercise cannot be

reviewed, and is not subject to any appellate tribunal. *Matter of the extension of Church street*, 455

DOGS.

1. Although it is unnecessary to prove that the owner of a dog had notice that his dog was vicious, to render him liable for the value of any sheep or lamb killed or wounded by such dog, the rule is different in respect to any other injury such dog may have done to the sheep or lambs of another. *Orinow v. Nichols*, 145
2. To entitle the owner of sheep or lambs to recover of the owner of a dog for any damage done by such dog to such sheep or lambs, aside from killing or wounding them, it is necessary for the plaintiff to prove that the defendant had notice, or knowledge, of the vicious propensity of his dog. *ib*
3. The owner of a dog is liable for the full value of each sheep or lamb wounded by his dog. To entitle the owner of the sheep or lambs to recover their value, it is not necessary for him to show that they died of their wounds. *ib*

E

EASEMENT.

1. A. being the owner of a mill factory, together with the easement, or right, to carry the waters of a creek across a certain parcel of land thereto, the defendant, for the purpose of constructing its railroad, acquired by purchase a portion of the land subject to such easement. The road being constructed in such a manner, and upon such a grade, that the water could no longer be conveyed to the factory across the land in a straight trunk, the defendant took down the original raceway, and carried the water under the railroad track, in a new trunk built for that purpose. A. accepted the new structure without objection, and used the water flowing through it, during his life; *Held*, that such acceptance of the substituted structure was in judg-

ment of law a compensation for all damages sustained by A. in consequence of the removal of the original raceway. *Arnold v. The Hudson River Railroad Company*, 108

2. The legislature may rightfully authorize the construction of railroads, or other works of a public nature, without requiring compensation to be made to persons whose property has not actually been taken, or appropriated, for the use thereof, but who may, nevertheless, suffer indirect or consequential damages by the construction of such works. *ib*
3. The case of a railroad company acquiring its roadway subject to an easement or servitude appurtenant to mill property, consisting of the right to carry water across the land of another, to the mill, is within the above principle. *ib*
4. If the owners suffer an injury by having the easement impaired, this is an injury which the property suffers in consequence of the construction of a public work, under legal authority, and not of the taking of the property. *ib*
5. Such a loss is to be regarded as *damnum absque injuria*, except in cases where, by statute, compensation is required to be made. *ib*

See JUSTICES' COURTS, 5.

EQUITABLE DEFENSE.

See PROMISSORY NOTES, 1, 2, 3.

EVIDENCE.

1. In an action to recover damages for refusing to deliver bonds, alleged to have been bought by the defendant as the plaintiff's agent, the plaintiff, to prove the value of the bonds, may show that they were paid by the company issuing them, in gold. He may also prove what gold was worth, in currency, at that time. (J. C. SMITH, J. dissented.) *Stimpkins v. Low*, 382
2. It is erroneous to limit the plaintiff's recovery, in such an action, to nominal damages, where there is

proof that the bonds were worth par, in gold, as collateral security, and the evidence warrants the conclusion that they were worth more than par, in currency. *ib*

8. Such evidence should be submitted to the jury, and it should be left with them to assess the damages, free from any restriction. The legal tender act, passed by congress, is not to be construed as excluding such evidence from the consideration of the jury. *ib*

4. It was not intended, by that act, to enable an agent, after having received for a claim gold coin, to relieve himself from liability by payment in currency. (*Per* INGRAHAM, J.) *ib*

5. Where there are no actual sales of an article, a witness may give his opinion of the value of such article. (*Per* INGRAHAM, J.) *ib*

6. In an action of trespass *quare clausum fregit*, brought in a justice's court, the plaintiff's title to the premises was derived from, and acquired under, a deed from D. and wife, in which the grantors reserved title in one half acre of the land, used for a cemetery; with the right of way to and from it. On the trial, the defendant asserted the right under the exception or reservation in such deed, to go to the cemetery, across the plaintiff's land, for the purpose of burying a relative. The defendant did not plead title, and the plaintiff gave no evidence of title, but simply proved his possession, and the defendant's entry upon his close, and the damages sustained. The defendant then gave certain deeds including that to the plaintiff, in evidence, for the purpose, as stated by his counsel, of showing the extent, limitation, and restrictions of the plaintiff's possession, and not with a view to show title. *Held* that for this purpose, the deeds were clearly unavailable. *Alleman v. Day*, 641

See AGREEMENT, 11, 12.
WITNESS.

EXPRESS COMPANIES.

See CARRIERS.

F

FACTORS.

See DEBTOR AND CREDITOR, 1, 2.

FALSE REPRESENTATIONS.

1. Though an individual is not obliged to answer inquiries in respect to the solvency of a third person, yet, having undertaken to do so, he is bound by every consideration of fairness and honesty, as well as by law, to speak truthfully, and is not at liberty to suppress a fact within his own knowledge, bearing materially upon the pecuniary responsibility of such third person. *Viele v. Goss*, 96

2. Where the defendant, on being inquired of by the plaintiffs in regard to the solvency of another, omitted to state in his reply, the fact that the latter was largely indebted to him, at the time, and alluded to his indebtedness in such a manner as would naturally have the effect to quiet any apprehension on that subject, and produce the impression that it was quite inconsiderable; and within a few months the indebtedness of such third person to him ripened into a judgment which absorbed the entire property of the debtor; and it was shown that had the extent of such debtor's liability to the defendant been stated, credit would have been refused to him by the plaintiffs; *Held* that the defendant was liable to the plaintiffs for the value of goods sold to such third person, on the strength of the defendant's representations. *ib*

FORECLOSURE SUIT.

See MORTGAGE, 8, 4, 5.

FORMER ACTION.

1. A former action, in order to be a bar to a second, must have been to recover for the same identical cause of action, or for some part thereof, as the plaintiff seeks to recover in the second. *McIntosh v. Lown*, 550

2. The rule upon this subject laid down in *Phillips v. Berick*, (16 John. 140,) approved. 3

See LEASE, 4.

FRAUD.

See DEBTOR AND CREDITOR, 3, 4, 5.
FALSE REPRESENTATIONS.
VENDOR AND PURCHASER, 5, 6.

FRAUDS, STATUTE OF.

See AGREEMENT, 5.
VENDOR AND PURCHASER, 3.

G

GOLD.

See AGREEMENT, 8, 9, 10.

GRANT.

1. By the terms of a grant, the plaintiffs' testator had "the right of conveying such quantity of water in an aqueduct under ground as shall be reasonable to be used" by him, "from any reservoir or spring of water now or hereafter found," on the lot occupied by the defendants; "provided that the quantity of water so used should not exceed the equal half part of the whole volume of water supplied by such reservoir or spring." *Held*, that the grant plainly authorized the construction of one aqueduct only, for the conveyance of water through the defendants' premises. That it gave no right to construct several, by way of experiment, to ascertain where the cheapest, or most convenient, or most reliable route could be found, or to dig up the soil for the purpose of discovering other springs. *Fitzhugh v. Raymond*, 645
2. *Held*, also, that the grantees, after constructing an aqueduct through the defendants' lands, from a reservoir thereon, and using the same for a number of years, had not the right, when the same got out of re-

pair, and from that cause failed to furnish a reasonable quantity of water, to go upon the defendants' lands, and construct another aqueduct, upon another route, and from another spring, nearer to the grantee's premises than the first reservoir, though such new aqueduct could be more conveniently and cheaply constructed than the old one could be rebuilt, and more easily kept in repair. 3

3. *Held*, further, that the grant was not void for uncertainty; because it could be made certain by locating and constructing the aqueduct. *Certum est quod certum reddi potest.* 3

H

HIGHWAYS.

1. Where land which had never been a highway was taken by a plank road company for the purposes of its road, the same being either donated to the company, or purchased and paid for by it, and the plank road company was subsequently dissolved, and its road abandoned, whereupon the commissioners of highways of the town claimed the land for a highway, and continued to use it as such; *Held*, that although the plank road company was a private corporation, all lands taken by it were for *public use*; and that the use to which the land in question was now devoted, to wit, a highway, being also a *public use*, was not such a *change* of the use as to justify the original owner of the fee in taking possession of such land in default of a new compensation to him. *Heath v. Barman*, 496
2. The statute of 1854, authorizing a plank road company to abandon its road, or portions of it, and providing that, thereupon, the road shall cease to be the road or property of the company, and revert and belong to the several towns through which it was constructed, should be construed as meaning plank roads constructed upon lands, though they had not previously belonged to the town, or been used for highways.

Such lands are to pass to the towns as highways. *ib*

8. Though the *reversion* in the lands taken for a plank road was and still continues in the original owner of the fee, yet the land having been lawfully taken for public use, the title, by the act of the original taker, and by force of the statute, passed to the town, upon the abandonment of the road, the same public use, in substance, being preserved. *ib*

HUSBAND AND WIFE.

1. Our recent statutes for the better protection of the separate property of married women have no relation to, or effect upon, real estate conveyed to husband and wife jointly. *The Farmers and Mechanics' National Bank of Rochester v. Gregory*, 155
2. In such a case the wife has no separate estate, but is seised, with her husband, of the entirety; neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate. *ib*
3. They hold thus not as joint tenants, or as tenants in common, but as tenants by entireties; and the same words of conveyance which would make two other persons joint tenants, will make the husband and wife tenants of the entirety. *ib*
4. When the estate thus held by them is voluntarily converted into money, the same belongs to the husband, exclusively, in virtue of his marital rights. And no rule of equity will give the wife the entire amount, as her separate property, to the exclusion of the rights of the husband and of his creditors. *ib*
5. In a case where there never was any separate estate or right in the wife, neither the statutes, nor the rules of equity, are sufficient to enable her to appropriate the entire property to herself, to the exclusion of the husband's creditors, although they became such during the joint ownership. *ib*

See COMPLAINT.

I

INFANTS.

1. An infant, when suing in his own behalf for injuries to his person arising from the negligence of others, must be free from the imputation of negligence on his part tending to produce the damages sought to be recovered. The rule is the same whether the action be by an infant or an adult. *Burke v. The Broadway and Seventh Avenue Railroad Company*, 529
2. It is no excuse for the want of ordinary prudence by an infant, that he had less discretion than a man. He is required to exercise the prudence of a person of ordinary intelligence, before an action for damages can arise for an injury to his person, resulting from the carelessness of others. *ib*
3. An infant is required to take the same care of himself as any other person. All are held accountable for a reasonable degree of prudence, as to their own safety. *ib*
4. The father of an infant, suing for damages sustained by the latter through the negligence of others, can recover only under the same circumstances of prudence as would be required if the action were in behalf of the infant. *ib*

See PRACTICE, 7.

INJUNCTION.

1. While, as a general rule, the courts of this state decline to interfere by injunction, to restrain its citizens from proceeding in an action which has been commenced in the court of a sister state, there are exceptions to this rule; and when a case is presented, fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction, to prevent oppression or fraud. No rule of comity or policy forbids it. *Vail v. Knapp*, 299
2. Thus, where property subject to chattel mortgages held by the plain-

tift, was attached in the state of Vermont, in an action brought there, in the name of the defendants, against the mortgagors, residents of this state; which property they were about to sell; and it appeared that the property, at the time it was attached, was actually and necessarily used by the mortgagors (a railroad company) in conducting their ordinary business, and that the seizure thereof had seriously embarrassed them in transacting their business, thereby materially diminishing their ability to pay the mortgage debts; that the parties to the record in the action in Vermont were citizens of this state; that the plaintiffs were not parties to such action, and could not properly be heard therein; that the plaintiffs' mortgages, being unaccompanied by actual possession, were not, as against creditors, recognized as valid by the courts of Vermont, but were valid in New York; that the defendants had voluntarily consented to the use of their names as parties to the action pending in Vermont, and had received indemnity from another person; and that such action and proceedings were prompted by hostility to, and a desire to injure, the mortgagors, which, if successful, would impair, if not wholly destroy, the plaintiff's securities; *Held*, that the case was *special*, within the decisions of the courts of New York; and as such, justified the continuance of an injunction restraining the defendants from selling the mortgaged property, until the final termination of the action brought by them, in Vermont. *ib*

8. Where the *gist* of an action was the alleged use by the defendants of a secret process of enameling, which R., one of them, had covenanted with the plaintiff not to divulge, and the exclusive right to use which, the plaintiffs claimed to have acquired from R. by purchase; it was *held* that there was no ground for the exercise of the equitable jurisdiction of the court, unless it was established that the defendants, some or one of them, were using the same secret process to which the covenants related, or that they threatened or intended to make the secret known, contrary to the stipulations of R. *Neale v. Ross*, 874

4. Where there was no positive evidence that the process in question was used in the business carried on by the defendants; the only testimony on that point produced by the plaintiff, being that of himself, detailing some circumstances observed by him in the defendants' shop, which tended in some degree to show that the process there used was the one in question, but came far short of establishing the fact; and the testimony of R. left it at least doubtful whether he used the process in question while in the employ of his co-defendant; *Held* that the refusal of the judge to find that such process was used in the defendants' business was not error; and that the testimony was not so clear and satisfactory as to warrant the court in finding the fact, contrary to the implied finding of the judge. *ib*

See METROPOLITAN BOARD OF HEALTH.
NEW YORK, (CITY OF.)
TRADE MARKS.

INSURANCE (MARINE.)

Where temporary repairs are made upon a vessel in a foreign port, by the insured, for the sole benefit of the insurers, and by their express consent and authority, to enable the vessel to be navigated to the port of destination, for the purpose of there making permanent repairs at less cost, the insurers must bear the whole expense of the temporary as well as the permanent repairs, although the amount, in the aggregate, exceeds the sum named in the policy. *Alexandre v. The Sun Mutual Insurance Company*, 475

INTEREST.

See AGREEMENT, 4.

J

JUDGMENT.

See ARBITRATION AND AWARD.

JURISDICTION.

Where proceedings before an inferior tribunal are attacked collaterally, great latitude of construction is to be indulged, in support of jurisdiction. *Pratt v. Bogardus*, 89

JUSTICES' COURTS.

1. Where the complaint in a justice's court specifies several unlawful trespasses, upon certain lands of the plaintiff described therein, and the defendant interposes a plea of title as to a parcel of the lands only, the plaintiff may avoid the plea by an amendment of his complaint. *Shull v. Green*, 811
2. Where the defendant's plea of title covers only a parcel of the land, the justice may discontinue as to that parcel, and try the action as to the alleged trespasses upon the residue. *ib*
3. Where, in such a case, the action was wholly discontinued by the justice, and the plaintiff, on a trial in the Supreme Court, upon the same state of the pleadings, recovered damages to an amount less than fifty dollars, for trespasses committed exclusively upon that portion of the premises *not covered by the plea of title*; *Held*, that the defendant, instead of the plaintiff, was entitled to costs. *ib*
4. If the defendant is in the *actual possession* of a parcel of the lands described in the complaint, it is unnecessary for him to plead title thereto in a justice's court, as his possession will be a sufficient protection against any claim of the plaintiff for an unlawful entry or trespass on that parcel. *ib*
5. A right of way across the land of another, for the purpose of going to and from a cemetery, is an easement—an interest in land—and affects the title to land; and such title cannot be tried in a justice's court. *Altman v. Dey*, 641

See APPRAIL.
EVIDENCE, 6.

JUSTICE OF THE PEACE.

See LANDLORD AND TENANT, 1 to 6.

L

LAND.

Land cannot pass by a conveyance, as appurtenant to land. *Matter of the New York Central Railroad Company v. The Buffalo and New York and Erie Railroad Company*, 502

LANDLORD AND TENANT.

1. The provision of section 5 of subdivision 2, of the act of April 8, 1849, to amend the Revised Statutes, in relation to summary proceedings to recover the possession of land, which authorizes such proceedings, when instituted before a justice of the peace, to be removed by appeal to the county court, in the same manner and with the like effect, as appeals from judgments of justices of the peace in civil actions, but directs that in case of appeal by the tenant, in order to stay the issuing of a warrant or execution, security shall also be given for the payment of all rent accruing or to accrue upon the premises subsequent to the application to the justice, does not apply—so far as relates to a stay—to proceedings instituted against a tenant solely on the ground that he is holding over after the expiration of his term. *Sage v. Harpending*, 166
2. That section of the statute does not create a right to stay the issuing of the warrant in a case where it did not previously exist, but it merely provides that in order to exercise the right to stay, in cases where it previously existed, security shall be given as therein prescribed. *ib*
3. An appeal to the county court, taken by virtue of the act of 1849, of itself, merely transfers the proceedings to the county court for the purpose of review, but does not affect the power of the justice to issue a warrant to enforce his judgment. *ib*
4. And a warrant so issued, being regular and valid, and the landlord having been put into possession of the premises by virtue of it, he is justified in using so much force as is necessary to defend himself and maintain his possession. *ib*

5. And in an action against him, by the tenant, for an alleged assault and battery committed in repelling the attempt of the tenant to re-enter, the only question for the jury is whether the defendant used an excess of force. ib
6. Even though it be assumed that a justice of the peace has not power to issue a warrant to dispossess a tenant after an appeal by the latter to the county court, yet his judgment, until reversed or set aside, is of force as an adjudication, and it determines that the lease has expired and the landlord is entitled to the possession of the premises. The fact that an appeal has been taken does not affect the conclusive nature of the judgment as a bar, while it remains unreversed. It is therefore erroneous to charge that the judgment ceased to be *res judicata* when the appeal was perfected. ib
7. Where the landlord and owner in fee, claiming that the term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands and attempt to dislodge the former by force. The landlord being in the actual possession has a right to maintain it, and to use force, if necessary, for that purpose. ib
8. The fact that a tenant, against whom summary proceedings are instituted by the landlord, to recover possession of the premises, has a good defense to the proceedings, will not entitle him to a writ of prohibition to restrain the magistrate from entertaining the proceedings. *The People ex rel. Bean v. Russell*, 851
9. Although it be plain that the magistrate cannot, in conformity with law, decide in favor of the landlord, he is not thereby deprived of jurisdiction over the proceedings. ib
10. If the judge has jurisdiction of that class of proceedings, he cannot be prohibited from adjudging upon the question of the termination or expiration of the term. It cannot be assumed that he will pronounce an erroneous judgment. On the contrary, the presumption of law is, that he will decide correctly. ib
11. The tenant must await the decision; and if it be erroneous, he has his remedy by *certiorari*, or an action for damages. ib

LEASE.

1. A lease taken by A. in trust for a corporation thereafter to be formed, creates, on the formation of such corporation, and upon its receiving an assignment of such lease, with knowledge of the terms upon which it was executed and received from the lessor by A., a liability in equity, on the part of such corporation, to pay the rent to the lessor; and such liability cannot be avoided by a transfer of the lease, by the corporation, to B. *Van Schaick v. The Third Avenue Railroad Company*, 409
2. The Buffalo, New York and Erie Railroad Company, by a lease dated February 27, 1863, demised, for the term of 490 years, to the New York and Erie Railroad Company "the railroad of the party of the first part, including its branch freight track, and all the land of the party of the first part situate within and from the city of Buffalo to and within the village of Corning * * * upon or across which its said railroad or any part thereof, or its machine shops, warehouses, freight or passenger depot buildings, car houses, engine houses or other shops or buildings are constructed, within or between the places aforesaid, and all the rights, title and interest which the said party of the first part has in or to the use of any wharves or docks in said city, or in or to any other branch track or tracks used by or in connection with the said railroad, together with the appurtenances thereunto belonging." At the date of this lease a strip of land 240 feet in length by 80 in breadth, situate in Buffalo, the title of which was in the lessor, was in the actual possession of another railroad company, and had been for some ten years, and was used by the latter company for its tracks and other railroad purposes. It had never been used by the lessor in connection with the operating of its railroad, nor was it necessary for that purpose. *Held*, that the strip in question was not included in the description of the

thing demise, viz. the "railroad" of the lessor; nor was it embraced by the words "all the lands" of the lessor "upon or across which its said railroad," &c. "are constructed," the railroad not having been constructed upon or across it; nor did it pass as an *appurtenance* to the railroad of the lessor. *Matter of the N. Y. Central Railroad Co. v. The Buffalo and N. Y. and Erie Railroad Company*, 501

3. A covenant, on the part of the lessees, in a lease, "to keep the buildings and fences in good repair, except natural wear and tear," binds them to rebuild in case of accidental destruction by fire or otherwise. *McIntosh v. Lown*, 550

4. Where a lease contained seven distinct independent covenants, the third of which was to keep the buildings and fences in repair, and the seventh, to build, during the continuance of the lease, 125 rods of fence; *Held*, that a former action by the lessor, upon the last covenant, for not building the fence, was not a bar to an action subsequently brought upon the covenant to repair; the two covenants being distinct, and having no connection with each other, except that they were contained in, and evidenced by, the same instrument. *ib*

LEGAL TENDER ACT.

See AGREEMENT, 8, 9, 10.
EVIDENCE, 8, 4.

LEGAL TENDER NOTES.

See RAILROAD COMPANIES, 9, 10.

LEGISLATURE.

See EASEMENT.

M

MANDAMUS.

1. The granting or refusing of the writ of mandamus, is a matter of discretion. To entitle a party to that

remedy, there must be a clear legal right, not merely to a decision in respect to the thing, but to the thing itself. *The People ex rel. Duff v. Booth*, 81

2. The court may exercise a discretionary power, as well in granting as in refusing a mandamus; as where the end is merely a private right, and when the granting of it would be attended with manifest hardships and difficulties. *The People ex rel. Hackley v. The Croton Aqueduct Board*, 259

3. This discretion should be exercised soundly, and in accordance with the peculiar circumstances of the case. *ib*

4. The defendants issued proposals for the building of a stone tower, engine house, &c. under a statute giving them authority for that purpose. The relators were the lowest bidders for the work, but the defendants refused to award the contract to them, or to any one else, for the alleged reason that no appropriation to cover the expense existed; and that since the time the proposals were received, they had materially changed and altered the design and character of the work to be done; and that they had decided that the public interests required that the work should be re-advertised and let under proposals framed in accordance with such alterations. *Held* that the issuing of the notice inviting proposals did not, alone and of itself, bind the defendants to award the contract to the lowest bidder, or create any obligation on their part, to award it at all. But that if the bids were extravagant, or far beyond the amount of the contemplated expenditure, they might, in their discretion, reject them altogether. *ib*

5. *Held*, also, that under the circumstances, it would not be a proper exercise of judicial power to grant a mandamus to compel the defendants to award the contract for the work in question to the relators. *ib*

See BROOKLYN (CITY OF).
TOWN.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. Ordinarily, an employer is not liable for injuries to one of his employees occasioned by the negligence of another employee engaged in the same general business. Such employees on entering the service take upon themselves, as an incident to the hiring, the ordinary risks and dangers arising therein, which includes the negligence or carelessness of their fellow servants. *Faulkner v. The Erie Railway Company*, 324
2. No distinction arises from the different grades or ranks of the employees, nor from their being engaged in different kinds of work; provided the services tend to accomplish the same general purpose. *ib*
3. An employer is, however, responsible for injuries to employees arising from his personal neglect, or from the want of ordinary care and precaution on his part, in the selection of employees. *ib*

See RAILROAD COMPANIES, 12, 13, 14.

MECHANICS' LIEN LAW.

The lien which a contractor for the erection of a building acquires by filing a notice with the county clerk, under the mechanics' lien law, (*Laws of 1851, ch. 518*.) attaches only to the legal right, title and interest of the owner, then existing. If, previous to the filing of such notice, the owner has parted with his interest in the property, no lien is acquired. *Ernst v. Reed*, 367

METROPOLITAN BOARD OF HEALTH.

1. The defendants, by an entry upon their records, declared that the premises of the plaintiff, and the business pursuit therein conducted, in their opinion, and in fact, were in a condition dangerous to life and health; and a public nuisance, and ordered that the business of slaughtering animals on the said premises be abated and discontinued, &c. The order was directed to be served as required by law, and executed by the Board of Metropolitan Police.

The defendants subsequently passed another ordinance, declaring that the slaughtering of animals should not be permitted or conducted after the 15th of June, 1867, at any place in the city of New York south of 42d street; nor at any place north of that street, nor in the city of Brooklyn, without a special written permit. The evidence showed that the plaintiff's premises were well sewered, and the business of slaughtering was conducted there by the plaintiff with the greatest care and cleanliness it was capable of, and that it was not, in this case, in fact a nuisance; and nearly all of the neighbors of the plaintiff, for a considerable distance, united in declaring, in writing, that the premises were not offensive, annoying or prejudicial to health, and in requesting the defendants not to interfere with the plaintiff in the prosecution of his business. The evidence also proved, as a fact, that the slaughtering of animals could be so regulated and conducted as not to be in any case a nuisance, or prejudicial to the public health. *Held* that the defendants were clearly exceeding any authority conferred upon them by the laws, in attempting to declare any thing to be a nuisance which is not such by the common law. And that they should be restrained by injunction from enforcing the said ordinance against the plaintiff as the proprietor of a nuisance, and, until the hearing and disposition of the case, from interfering with his business, except for police inspection and regulation. *Schuster v. The Metropolitan Board of Health*, 450

2. While the inspection and regulation of pursuits in a large city, which are liable to become injurious to the public health and safety, are within the police powers lawfully delegated to, and exercised by, local and municipal corporations, the power to suppress such pursuits, when they have been immemorably exercised, is wholly beyond and above the police powers, and extends into the domain of legislative function. *Per* LEONARD, J. *ib*
3. The Metropolitan Board of Health, holding office by the appointment of the governor, and not being elected by the people of the city of New

York, nor appointed by any power so elected, are not officers holding from a source permitting the exercise of local legislation to be conferred on them. *ib*

MISTRIAL.

See PRACTICE, 1.

MORTGAGE.

1. A mortgage given by a railroad company to secure the payment of its bonds, a bond issued by the company, and a certificate indorsed thereon, stating that such bond is included in the mortgage, are all to be construed together, as parts and parcels of the same security. *Bon-jamin v. The Elmira, Jefferson and Canandaigua Railroad Company, 441*
2. A mortgage, executed by a railroad company upon its railroad, with the lands, tracks, buildings, privileges and franchises, "together with all the locomotives, tenders, cars, carriages, tools and machinery owned or thereafter to be owned by the company, or in any way belonging to or appertaining to said road and to be used thereon," is valid in equity, in respect to subsequently acquired property; and a decree in a suit brought to foreclose the same, declaring such to be its effect, and directing a sale of all the property embraced therein, is a conclusive adjudication upon that point against all persons, parties or privies in that suit. *ib*
3. Persons made parties to a foreclosure suit as subsequent incumbrancers by judgment or mortgage, whose rights were already acquired, and existed at the commencement of the suit, are bound to set up their claims and assert their rights, in that action, at the peril of being cut off and foreclosed, in respect to such claims. *ib*
4. But if the decree in such action were not binding upon persons made parties as subsequent incumbrancers, the decision of the court upon questions raised and litigated by other

parties, as to the validity and effect of the subsequent incumbrances, is *res adjudicata*, and the question cannot be again litigated, while such decision remains unreversed. *ib*

5. If individuals are made parties defendants to a foreclosure suit as subsequent incumbrancers, that is sufficient, as respects the conclusiveness of the decree therein, whatever may be the nature of their liens. It is of no consequence that the plaintiff has made them parties as judgment creditors, when they hold a chattel mortgage upon the property. *ib*

See PRACTICE, 4, 5.
STREETS, 8.

MUNICIPAL CORPORATIONS.

1. In case of a village or city, where the trustees, or common council, are made commissioners of highways, the corporation is liable for their negligence in not repairing the highways within the corporate limits. *Clark v. The City of Lockport, 580*
2. Where a street in a city was in an unsafe condition, so that a person knowing its condition would have been guilty of negligence in attempting to use it by driving through it, but the danger was concealed by a snow that had recently fallen; it was held that a traveler was not bound to know that water crossing the street had congealed into ice, which was covered by the snow; and he was not, therefore, chargeable with negligence in attempting to pass along the street, with his horse and buggy. *ib*
3. And the referee having found that the plaintiff had sustained damages by a fall, caused by the dangerous condition of the street, and the negligence of the city in not putting and keeping the street in proper repair, and that he was free from negligence or fault; a judgment in favor of the plaintiff, against the city, was affirmed. *ib*

MURDER.

See CRIMINAL LAW, 8 to 11.

N

NEGLIGENCE.

See INFANTS.

MASTER AND SERVANT.

MUNICIPAL CORPORATIONS.

RAILROAD COMPANIES, 3, 4, 5, 6, 7,
8, 11 to 22.

NEW TRIAL.

A new trial may be granted on the ground of *inadvertence* and *surprise*, at the trial, where the plaintiff shows that he had believed the instrument under which he claimed was an *agreement*, and was surprised by the ruling of the judge that it was a *mortgage*, requiring a different revenue stamp from that affixed thereto, and he was not then prepared to meet the objection. *Hopock v. Stone*, 624

See RAILROAD COMPANIES.

NEW YORK (CITY OF.)

1. The corporation of the city of New York are not authorized, since the passage of the act of the legislature, of May 4, 1866, (*Laws of 1866, ch. 876*), to contract for lighting the city with gas, for a period beyond one year, nor for an amount larger than the sum appropriated by that act to the specific purpose of lighting the streets for the year 1866. *Pullman v. The Mayor, &c. of New York*, 57
2. A contract on the part of the corporation which is to extend over a period of twenty years, though void, would, if made, confer rights of property, and the fact of its having been entered into might present embarrassment in the way of its being subsequently set aside. The preventive remedy by injunction may therefore be adopted, under such circumstances. *ib*

See STATUTES, 2.

NUISANCE.

See METROPOLITAN BOARD OF HEALTH.

O

ONUS PROBANDI.

See ANSWER, 3.

OPINIONS OF WITNESSES.

See EVIDENCE, 5.

P

PARENT AND CHILD.

See CARRIERS, 3.

PARTIES.

1. By the terms of an agreement between S. and the plaintiff, the business relating to a joint adventure was to be done in the name of the plaintiff alone, and it was so done, in fact, S. contributing nothing to the adventure in money, services or time. The defendants dealt with the plaintiff in his individual name, and treated him as the only person interested. *Held* that the plaintiff might maintain an action to recover a balance due from the defendants on account of the adventure, without joining S. as a co-plaintiff. *Howe v. Savory*, 408
2. *Held, also*, that if S. had in fact an interest in the subject matter of the action, as between himself and the plaintiff, the latter might be regarded as the *trustee* of S. to that extent, and, as such, entitled to sue in his own name. *ib*

See MORTGAGE, 3, 4, 5.
PARTNERSHIP.

PARTNERSHIP.

1. One purchasing property for others merely as their agent, and depending for the measure of his compensation upon the amount of profits realized by his principals from the transaction, is not a partner with them in the property so purchased. *Lewis v. Greider*, 606

2. And, although interested in the amount which may be recovered in an action brought by his principals against purchasers, to recover damages for a breach of their contract to buy such property, not being a part owner of the property, he need not be joined as a plaintiff therein. *ib*

See AGREEMENT, 3.

PLANK ROADS.

See HIGHWAYS.

PLEADING.

See ANSWER.
COMPLAINT.

POWER.

When a power is to be exercised by several persons, a majority of the whole number may proceed to act, and their action will be legal, provided all the members composing the body are summoned to attend, or had notice of the time and place of meeting. *Matter of the Extension of Church street,* 455

See WILL, 3.

PRACTICE.

1. It is a mistrial for the judge at the circuit to direct judgment to be entered for the plaintiff subject to the opinion of the court at general term; and the case will be sent back, unless the parties consent to a modification of the decision. *Freeborn v. Wagner,* 48

2. A summons, issued by an attorney, with his name printed at the end thereof, is "subscribed" by him, within the requirements of the Code. *Barnard v. Heydrick,* 62

3. It is allowable, on application for orders of publication, and of a like nature, to read affidavits made and entitled in another action. *ib*

4. In an action for the foreclosure of a mortgage, the non-residence of the

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defendants need not be shown, to entitle the plaintiff to an order for publication. It is sufficient, to show that the defendants cannot, after due diligence, be found within this state so as to enable the plaintiff to serve the summons upon them. *ib*

5. It is to be presumed, from the fact of making an order for publication, that the affidavits recited therein afforded satisfactory evidence to the court of the requisite facts, as to the plaintiff's inability to serve the summons on the defendants, within this state. Hence, the omission so to state in the order, does not affect its validity. *ib*

6. An order directed to be served by mail need not be filed before the papers are mailed. The previous deposit of the papers is, at most, an irregularity, that can be remedied at any time, by filing the order *nunc pro tunc.* *ib*

7. After an answer has been put in, for an infant, by his guardian *ad litem*, and judgment has been entered, the regularity of the guardian's appointment cannot be questioned. *ib*

8. Where the real question involved in an action has not been presented, or determined, the verdict will be set aside. *Bunnell v. Greathead,* 106

9. A service of a summons on a director of a corporation is regular, and will give the court complete jurisdiction of the parties. *Curtis v. The Leon, Genesee, &c. Railroad Company,* 148

PRINCIPAL AND AGENT.

1. If a general agent has received particular instructions, which he disregards, his acts as agent are nevertheless, binding upon his principal. As between the principal and a general agent, any deviation from particular instructions will render the latter accountable to the former, for any loss he may sustain in consequence of such deviation; but, as to third parties, who may have dealt with the agent, any limitation of the authority, not communicated to

them, can have no effect. *Edwards v. Schaffer*, 291

2. P., who purchased of the plaintiff certain goods for the defendants, was employed by the latter to transact their business in that branch of their commercial house situated in the city of New York. They had a manufacturing establishment in Prussia; they transmitted a portion of the goods there manufactured to New York, which were sold there by P., who was in the habit of purchasing goods for them there, to be used in their manufactory in Prussia. P. published notices, and wrote letters in the defendants' name; wrote orders in their name and style; and acted precisely as his principals would have acted had they been here. The firm name of the defendants was on the sign over the door of their place of business, in New York; and when payment for the goods in question was demanded, P. wrote a note, signed in the name of the firm, promising payment at an early day. *Held*, that this was sufficient to show that P. was the defendants' general agent, acting as their representative to do everything for them which the necessities of their business here required. . And that in the absence of any instrument expressly appointing him to do this, the facts showed an implied authority. *ib*
3. Where principals accept and pay for, a portion of the goods purchased for them by their agent, they thereby dispense with any particular instructions, directing that the whole shall be delivered at once. If they design to accept no more than the portion already delivered, they should give early notice of that intent. *ib*
4. The general rule is that sums received from third persons by an agent, in the business of his principal, either as profits or compensation, belong to the principal. But this rule being for the benefit of the principal, he may waive it, and with his consent the agent may retain to his own use moneys thus received. The evidence of such consent, however, should be clear and satisfactory. *Howe v. Savory*, 403

See Stock.

PRINCIPAL AND SURETY.

1. To exempt a surety from liability by reason of the neglect and refusal of the creditor to collect the debt of the principal debtor while he was solvent, although requested to do so, by the surety, it must be shown that the creditor was requested to enforce the collection of the debt *by due process of law*. Nothing short of that, in such a case, will exonerate the surety. *Singer v. Troutman*, 182
2. Where the request was, that the creditor should "push" the principal debtor, "and keep pushing him;" *Held*, that the words used had not the same legal significance as the words "prosecute or collect;" that to give those terms the same legal significance, it was necessary not only that the creditor should have understood them in that sense, but that the surety should have meant and intended that also. *ib*
3. The terms in which such a request are made, are not material, but they should be unequivocal, and clearly and plainly intended and understood as a request to collect by prosecution. *ib*

PROHIBITION (WRIT OF.)

See LANDLORD AND TENANT.

PROMISSORY NOTES,

1. In an action upon a promissory note, brought by a person who is not a *bona fide* holder thereof, he having assumed no liability nor parted with any thing as a consideration for the delivery of the note to him, any defense which could have been interposed by the defendant to the note in the hands of the payee, is available to such defendant. *Van Valkenburgh v. Stuppleson*, 99
2. Under the provision of the Code allowing a defendant to plead and sustain by evidence any defense, legal or equitable, which he may have, the defendant in such an action may set up as a defense, and prove, a verbal agreement accompanying and qualifying the delivery of the note, in connection with a subsequent surrender of property to,

- and acceptance thereof, by the payee, upon which a surrender of the note, while in the hands of the payee, would have been compelled, in equity, before the Code. *ib*
3. Otherwise, if the note had been transferred, before maturity, to a *bona fide* holder. *ib*
4. An instrument signed by four persons, by which they, six months after date, for value received, with use, jointly and severally promise to pay a person named, or bearer, the sums set opposite their names, for and in consideration of the right to make, use and vend a patent right in a specified district, is, in legal effect, a promissory note. *Ballard v. Burnside*, 102
5. Each signer is jointly and severally liable for the whole amount subscribed, and the only effect of subdivision of amounts opposite each name is to determine their rights between themselves. It amounts to nothing as between the makers and the payee, or bearer. *ib*
6. Such an instrument is not to be construed as containing four separate contracts, requiring a five cent internal revenue stamp for each; but is sufficiently stamped, if a ten cent stamp be attached. *ib*
7. Even assuming that such an instrument, contains four several agreements, it may be held good as to either of the signers, if offered in evidence on the trial, against him alone. *ib*
8. Where an accommodation note not restricted as to the mode of its use, by the lender, has been transferred to pay or secure a precedent debt, the holder may recover, because the note has answered the purpose for which it was created, and the maker is to be considered as consenting to any use which operates to the benefit of the borrower. *Schupp v. Carpenter*, 542
9. The rule is otherwise where the note has been obtained by fraud; or was given for a specific purpose; or is void in the hands of the payee on grounds of public policy, or otherwise. In such a case a precedent

debt is not a consideration for a transfer of the note, which will entitle the holder to recover. *ib*

R

RAILROAD COMPANIES.

1. An agent of a railroad corporation, having charge of a depot, and the freight therein, is the proper person to inquire of, respecting lost baggage; and his answer is part of the evidence of the loss, and admissible, *as res gesta*. *Curtis v. The Avon, Genesee, &c. Railroad Company*, 148
2. So, in regard to an arrangement between a passenger and the baggage master, at a station, that the baggage of the former may remain at the depot, and that the latter will see to it until it can be sent for. *ib*
3. In an action by a passenger, against a railroad company, to recover for lost baggage, evidence to show that the passenger was lame, and unable to take charge of his baggage, personally, is admissible, as tending to prove that he was guilty of no negligence in not calling for, and taking charge of, his baggage, upon the arrival at his place of destination; and as furnishing a good reason for making an arrangement with the agents of the railroad company that it should remain in the custody of the company until called for. *ib*
4. Where a passenger, on arriving at his destination, neglects to look after his baggage, and negligently leaves it, without any arrangement that the carrier shall retain it for him, and it is lost while thus situated, without fault on the part of the carrier, the latter is not liable. *ib*
5. But where there is no delivery of baggage carried upon a railroad, to the passenger, and no neglect to claim it, or inquire for it, but on the contrary the company's agents agree to retain it until it can be sent for, the company's liability as a common carrier continues after the baggage is taken from the cars, and until it is delivered or tendered to the owner. *ib*

6. Where a railroad bridge was well built, of good sound materials, upon a plan in common use, and the evidence as to its strength and capacity was abundant, and its sinking was in no sense due to any defect in its original construction, but to a process of natural decay, called dry rot; and the day before it fell it had been inspected by the repairer of bridges, and the division superintendent, competent men, and examined, tested and watched under the weight of a train of cars, and was deemed by them entirely sound and safe; *Held* that the company was not liable to the representatives of an employee who was killed by the falling of the bridge, either on the ground of a defect in its construction constituting negligence, or want of ordinary care, or by reason of the employment of incompetent, unskillful or improper persons to examine the bridge. *Faulkner v. The Erie Railway Company*, 824
7. *Held, also*, that to render the company liable, on the latter ground, it must affirmatively be made to appear that proper care was not used in the selection of its agents; and that by the exercise of proper care those agents would have been rejected as incompetent. The company is not a guarantor of competency or fitness in its employees. *ib*
8. *Held, further*, that the company was not responsible for the insufficiency of the bridge, in the absence of notice; unless the company was ignorant of its condition through its negligence or want of proper care. *ib*
9. Under the Act of Congress, approved February 25, 1862, authorizing the issue of United States notes, and declaring that they shall "be lawful money and a legal tender for all debts, public and private, within the United States, except duties on imports, and interest," &c. a railroad company is bound to accept United States notes issued in pursuance of that act, at the value expressed on the face of them, in payment of fare upon its railroad, when demanded in advance of transportation on such road. *Lowie v. The New York Central Railroad Company*, 830
10. If it exacts payment of the legal fare of a passenger, in advance, in gold or silver coin of the United States, or the market value of such coin, in United States notes, it will be guilty of extortion, and liable to the penalty imposed by the act of the legislature of March 27, 1857, for asking and receiving a greater rate of fare than that allowed by law. *ib*
11. Railroad companies, as common carriers of passengers, must be held to guaranty the soundness and safety of their vehicles, their bridges, roadway and machinery. *Warner v. The Erie Railway Company*, 558
12. But this rule does not apply in the case of servants of a railroad company; there being no such guaranty as between master and servant. *ib*
13. The remedy of a servant, against a master, for injuries sustained in the service of the latter, rests entirely upon the ground of misfeasance or negligence. *ib*
14. For injuries sustained by a servant, in his master's employment, an action lies in three cases: 1st. Where the injury was caused directly by the personal fault, negligence or misfeasance of the master. 2d. Where the injury resulted from the careless hiring or retaining of incompetent or unskillful servants in superior positions. 3d. Where the master does not take proper precautions for the safety of his servants, but subjects them to injury by the use of unsafe machinery, or exposes them to unreasonable risks and dangers. *ib*
15. In an action by the personal representative of a person who was killed while in the employ of the defendants, upon their railway, as a baggage master on a train of cars, by the breaking down of a bridge, to recover a compensation for the injury, when the plaintiff rested, on the trial, she had proved that the bridge fell from decay; that one of the chords was badly rotted, and a great many pieces of the bridge were decayed, more or less; that four or five posts were rotted at the tenons clear through; that the bridge had been built more than ten years, of

- timber but partially seasoned, and then painted, thus causing dry rot; and by the testimony of several experienced bridge builders, that such a bridge could not reasonably be expected to stand over from five to eight years. *Held* that upon this undisputed testimony the judge properly refused to order a nonsuit; and that he would not have been warranted in taking the case from the jury. *ib*
16. Although the law does not require that the directors of a railroad corporation as individuals shall possess particular professional or mechanical knowledge or skill in engineering, bridge building, or railroad construction or repairs, or that they possess more knowledge or skill in respect to such matters than men ordinarily do, yet it does require that they, as a board representing the corporation, exercise ordinary care and diligence in providing for the construction, care and maintenance of the road, and for the safety of the employees of the company, so that they be not subjected to unnecessary and unreasonable risk and danger. *ib*
17. To charge a railroad company with negligence, it is not necessary to show that the directors knew, or had notice of defects in their machinery, or in the construction of the railroad, or in its bridges or otherwise. It is their duty, acting for the corporation, to anticipate decay and failure in their works and structure and machinery, and to provide against such decay and failure in season to prevent injury or damage; and a clear omission to do so on their part, is negligence, and negligence of the corporation. *ib*
18. The appointment of competent and skillful agents is simply the discharge of a single duty, and will save the corporation from liability for negligence on that ground. But if skillful and competent agents neglect their duty to the injury of the servants of the corporation, or others, the corporation is not absolved. Such neglect is still the neglect of the corporation. *ib*
19. The exemption of a principal from liability to a servant for an injury inflicted by the negligence or want of care of a fellow servant, extends to all cases where the servants are strictly *fellow-servants* in the same department of service, and are not subject to the order or control of each other. *ib*
20. All subordinates who are under the control of a superior, are entitled to hold such superior as representing the master, and the master as responsible for his incompetency or misconduct. *ib*
21. Thus where a railroad corporation, through its board of directors and its other agents acting under their authority, is guilty of negligence in not taking the proper care and precaution to see to it and know that a bridge is safe and secure, and a baggage master in its employ is killed by the breaking down of such bridge in consequence of decay, the corporation is liable in an action for damages, brought by the personal representative of the deceased. *ib*
22. Where, in an action against a railroad company, to recover damages for a personal injury, there was no pretense that there was any negligence on the part of the defendants, which could sustain the action, except in the omission of the engineer or person in charge of the defendants' locomotive to ring the bell, or sound the whistle, at a street crossing; and the testimony of the engineer, upon that point, was positive and unqualified, that the whistle was blown and the bell rung, and an other witness testified that he heard the bell ringing, and saw the engine pass; and this testimony was clear, positive and circumstantial, and uncontradicted, except by the testimony of the plaintiff, and another person near by at the time, who swore that they heard no bell or whistle; *Held*, that a verdict in favor of the plaintiff was not warranted by the evidence; and a new trial was granted, *Sibert v. The Erie Railway Company*, 583

See EASEMENT.

MASTER AND SERVANT.

RECEIVER.

1. The defendant in an action brought by a receiver as such, put in a demurrer, which, on motion, was stricken out as frivolous; and she, on applying to the court for leave to answer, was allowed to do so, provided that she executed a bond, with sureties, conditioned that if the plaintiff should finally recover judgment against her she would obey such judgment and would pay the plaintiff the sum thereby directed to be paid. Such bond was thereupon executed. In an action thereon; *it was held* that the execution of such bond to the plaintiff *as receiver* must be deemed an admission by the obligors, not only that the plaintiff had been duly appointed receiver, but also that the receiver was authorized to bring the action mentioned in the condition of the bond. *Scott v. Duncombe*, 78

2. *Held, also*, that it was not necessary for the plaintiff, on the trial, to show the judgment recovered, and execution issued and returned unsatisfied; especially as the defendant had not set up in his answer that the plaintiff had not been regularly appointed receiver, and made no attempt to show that he had not been, on the trial. *ib*

3. *Held, further*, that it was not necessary for the plaintiff to introduce even the original order appointing him receiver, or his bond as receiver. *ib*

4. The surety in a bond given to a plaintiff suing as receiver, conditioned to pay any judgment the plaintiff may recover against the principal obligor, in that action, is liable for the amount of judgments recovered in cases wherein the obligee is appointed receiver subsequent to the execution of such bond, as well as for the amount of those recovered previously. *ib*

REFEREE.

1. A referee is not required to find upon any other facts than those which enter into and form the basis of the judgment to be entered upon his report. He is not required to

negative, in express terms, any other facts. Facts not found are necessarily negatived by implication. *Sermon v. Baetjer*, 362

2. Where, in an action upon a charter-party, the answer set up as a defense that the plaintiff induced the defendants to enter into the agreement by representing that the vessel would carry at least 480 tons of such cargo as the defendants desired to ship, which representation was false and fraudulent; and the referee found that the parties executed the charter-party set out in the complaint, and that no false or fraudulent representations were made by the plaintiff or his agent, to the defendants, or either of them, with respect to the vessel chartered, for the purpose of inducing them to enter into said agreement, or for any purpose; *Held* that the finding was sufficient. *ib*

3. A finding that the parties executed the charter-party set out in the complaint, and that the plaintiff fully performed all the conditions of his agreement, is sufficiently explicit in respect to the plaintiff's performance. It is not necessary to find in what manner he performed, or what particular acts he did by way of performance. *ib*

REVENUE STAMPS.

1. The latter clause of the provision of the Internal Revenue Act of the United States authorizing the collector to allow stamps to be affixed to mortgages, when they have been omitted without intent to evade the provisions of that act, or to defraud the government, but declaring that "no right acquired in good faith before the stamping of such instrument * * * and the recording thereof, if such record be required by law, shall in any manner be affected by such stamping," &c. does not apply to *chattel mortgages*, inasmuch as it contemplates mortgages which require to be recorded. *Vail v. Knapp*, 299

2. Chattel mortgages are merely filed, and an entry made in a book kept by the clerk, of the names of the parties, the amount secured, the date, time of filing, and when due. This cannot be regarded, in any

proper sense, as *recording* a mortgage. *ib*

3. The statute is highly penal, and should not, even in a doubtful case, receive a construction which would invalidate the security. *ib*

4. Under the provision of schedule "B," of the revenue act, specifying among the instruments which require to be stamped, "mortgage of lands, estate or property, real or *personal*, heritable or moveable, whatsoever, where the same shall be made as a security for the payment of any definite and certain sum of money lent at the time, or previously due and owing, or forborne to be paid, being payable," no stamp is necessary upon mortgages executed to secure the mortgagees as drawers and indorsers of drafts drawn for the benefit of the mortgagors, and payable *subsequent to the execution of such mortgages*; where no money was lent at the time, nor had any become due and owing, nor was any forborne to be paid, *being payable*. *ib*

5. A party has no vested right in the penalties inflicted by the revenue laws for the omission of another to place the proper revenue stamp upon an instrument, which cannot be taken away by an amendment of the act imposing such penalties. *Hopack v. Stone*, 524

6. The use of an instrument in evidence when not properly stamped, is forbidden by the government, as an act of policy, for the more safe and speedy collection of the duty, and not for the purpose of benefiting the one party or the other to the obligation. The power to alter or regulate this policy belongs to the government. *ib*

7. The right of a party claiming property as assignee thereof, in trust for the benefit of creditors, to set up the invalidity of a prior mortgage upon such property, by reason of its lacking the proper revenue stamp, may be taken away by a subsequent amendment of the act of congress imposing the penalties for omitting the appropriate stamps; notwithstanding the mortgage was executed

before the amendment went into operation. *ib*

See NEW TRIAL.
PROMISSORY NOTES, 6.

RIGHT OF WAY.

See JUSTICES' COURTS, 5.

ROCHESTER (CITY OF.)

See STREETS, 2, 3, 4.

S

SALE.

See STOCK, 2 to 9.
VENDOR AND PURCHASER, 1 to 4.

SERVANT.

See CORPORATION.
RAILROAD COMPANIES, 12, 18,
14, 15.

SHEEP.

See DOGS.

SHIPS AND VESSELS.

1. Within the contemplation of the act of April 2, 1862, providing for the collection of demands against ships and vessels, and other similar statutes, the place where the services are in fact rendered, although they are rendered under and in pursuance of a contract made at another place, is the place where the debt is deemed to have been contracted. *Mullin v. Hicks*, 250
2. Thus, where a contract was entered into at the city of New York, between the plaintiff and the master of a ship, by which the former agreed to load said ship, with oak timber, for a specified sum; and the ship—then lying at Brooklyn—was afterwards moved to Weehawken, in the

state of New Jersey where she was loaded by the plaintiff, under and in pursuance of the contract; *Held* that the sum due to the plaintiff for his services in loading the ship was not a debt contracted within the state of New York, nor a subsisting lien, upon the vessel, for which an attachment could be issued under the act above mentioned. *ib*

3. Where a vessel is run by the master, on shares, it is not a chartering, nor does the master become owner, for the time being; and parties dealing with him are justified in considering him clothed with the usual authority of a master; especially where one of the owners indorsed the action of the master, in dealing with such parties, before they gave him credit. *McGready v. Thorne*, 488

4. Under such circumstances, the master can bind the vessel and her owners, for supplies and necessities furnished. *ib*

5. Where the master testifies that money advanced to him, and expended, by the plaintiffs, was for the account of the vessel; that the plaintiffs rendered him an account, and he certified it to be correct; the mere fact that he is unable to state, after the lapse of several years, what the money was expended for, will not weaken the force of such testimony. *ib*

SOLVENCY.

See FALSE REPRESENTATIONS.

STATUTES.

1. It is a general rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing. *McMannis v. Butler*, 176

2. The 4th section of the act of April 7, 1868, (*Laws of 1868, ch. 95*.) authorizing the Croton Aqueduct Board to construct the work therein mentioned, and to purchase the materials necessary for the same, "at such places, and in such manner, by contract, as they may deem the public interests require," is inconsistent with the first section of the act of

1861, (*Laws of 1861, p. 702*.) which enacts "that all contracts by and on the behalf of the mayor, aldermen and commonalty of the city of New York shall be awarded to the lowest bidder for the same, respectively, with adequate security; and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids;" and the act of 1868 being the latest enactment, its effect is to except the Croton Aqueduct Board from the operation of the act of 1861, and, to that extent, to repeal that act. *The People ex rel. Hackley v. The Croton Aqueduct Board*, 259

3. The act of February 10, 1865, (*Laws of 1865, ch. 29*.) was not repealed by the act of February 24, 1865, (*Laws of 1865, ch. 41*;) it being the intention of the legislature that the former act should be considered in full force, notwithstanding the enactment of the latter. *Powers v. Shepard*, 418

4. The provisions of chapter 29, of the Laws of 1865, prescribing a maximum sum to be paid for enlisting soldiers, and forbidding the payment of a higher sum by cities, counties, &c. are not unconstitutional. *ib*

5. The 4th section of that act took effect immediately, notwithstanding the provisions of chapter 41 of the laws of 1865, suspending the operation of the sections of chapter 29, incorporated into chapter 41, and there re-enacted. *ib*

See CONSTITUTIONAL LAW.
HUSBAND AND WIFE.
STREETS, 4.

STOCK.

1. A purchase of stocks by brokers, as agents for another, with an advance of money by the former on account of the latter, upon condition that the principal shall deposit a margin of ten per cent, and deposit a further margin when required by the agents, is not to be considered a pledge of stocks for the payment of a sum of money advanced thereon, and requiring a notice of the time and place of

- selling the pledge, to make the sale legal. *Hanks v. Drake*, 186
2. Under such an agreement, the agents have a right, upon the principal's failing to deposit a further margin when required so to do, to sell the stock and close the transaction. *ib*
 3. This right to sell arises from the previous violation of the contract on the part of the person for whom the stock was purchased, and who, by neglecting to perform on his part, has terminated the obligation of his agents to hold the stock any longer, and left them at liberty to sell the stock for their own protection. *ib*
 4. The notice which the law requires in the case of the sale of pledged stock, as security for the payment of a sum of money advanced thereon is not required, in such a case. *ib*
 5. But before the owner of the stock can be called upon under such a contract, to deposit any additional margin, the agents should give him notice that his margin is diminished, and that they require a further margin. And a reasonable time to comply should be allowed, before the stock can be sold. *ib*
 6. Where agents, within two hours after giving notice to their principal that a further margin was required, no time being specified for compliance, sold the stock and rendered an account of sales; *Held* that the court could not hold, without further evidence, that reasonable time for performance had been given. That to decide that point as matter of law, the facts should appear, by which the court could say the party was able, within the time given, to do the act required, and therefore that the time was reasonable. *ib*
 7. Where all the evidence on that subject was that furnished by a former transaction between the same parties, in which, the same notice being given, the agents waited until the next morning, when the deposit was made, and it was satisfactory; *Held* that the principal had a right to suppose that the same course of dealing which had occurred on the former transaction, and was satisfactory to the agents, was expected in the present case; and if the agents required compliance in any shorter time, that they should have given notice accordingly. *ib*
 8. If the owner of stocks intends to claim that a sale thereof, made by his agents, was void as being prematurely made, he should dissent at once, and notify the agents of his dissent. *ib*
 9. Where the owner of stocks received information of a sale thereof by his agents, in May, and remained silent until September, when he demanded an account of sales, which was sent to him, with a check for the balance due him, which he indorsed and collected; *Held* that this amounted to a full ratification of the sale; and that it was too late for him afterwards, to seek to set it aside. *ib*
 10. Where scrip, purchased by a person as agent for another, is taken in his own name, and has stood in that way, on the books of the corporation, for several years, it is a legal inference that it was by consent or permission of the principal. A demand and refusal, in such a case, to transfer, will not give the principal the title to the scrip; and possession, without a transfer, would be of no avail to him. *Wheeler v. Allen*, 460
 11. A party cannot recover scrip of which the legal title is in the defendant by his permission, in an action of *replevin*, or the corresponding action of *claim and delivery*. If such party desires the identical scrip, his remedy is in equity. If he desires damages, only, he can, *it seems*, maintain an action on the case. *ib*
 12. Where a person employs brokers to purchase stocks for him, upon an agreement that he shall keep a margin of ten per cent upon the par value above market rate, of the shares, in the hands of the brokers, and he fails to do so, whereupon the brokers notify him of a fall in the market price of the shares, and that they require him to furnish more money, to make his margin good, they may, upon his neglecting to comply, sell the stock, at the stock exchange, without further notice to

the owner. (WELLES, J. dissented.)
Markham v. Jaudon, 462

13. There is, under these circumstances, a clear breach of the principal's contract, which justifies the brokers in selling; and the notice of the time and place of sale, required in the case of a sale of pledged stock, need not be given. *ib*
14. The defendants having testified to an express agreement that the stock purchased by them might be sold, if the margin was not kept good, without any notice of the time or place of sale; *Held* that it was error for the judge to charge the jury that such an agreement was wholly improbable. *ib*

SUMMARY PROCEEDINGS.

See LANDLORD AND TENANT.

STREETS.

1. After commissioners to estimate the expense and assess the damages of widening a street in a city have been appointed, in pursuance of a special act of the legislature, and have made their final report of estimate and assessment, which has been confirmed by the county court, and the proceedings have been reversed, on certiorari, by judgments of the Supreme Court, such commissioners have no power to file another report of estimate and assessment, in the same matter, their appointment being annulled by such judgments, and the commissioners being thenceforth *functi officio*. (J. F. BARNARD, J. dissented.) *The People ex rel. Reynolds v. The City of Brooklyn*, 136
2. In an action for trespass on real estate, the plaintiff claimed to have acquired the title in fee to the premises by a purchase at a foreclosure sale. The defense was that the plaintiff's title was subject to a public easement or right of way; that the *locus in quo* was a public street; and that the acts complained of were done by the defendant in the rightful exercise of his authority as street superintendent, and by the direction of the common council of the city of Rochester, who had control of the streets of the city. The only evidence to prove the existence of the alleged street consisted of testimony tending to show a dedication and user; but there was no proof of an effective dedication prior to the execution of the mortgage in 1857, at a sale under which the plaintiff became the purchaser; the only evidence looking that way being a map, made and filed in 1826, on which the premises were marked as a part of a street. But there was no proof of an acceptance by the city, nor that the parties who made and filed the map ever owned the premises, or had any right or authority to dedicate them. *Held* that the evidence was insufficient to show a dedication of the premises to the public. *McMannis v. Butler*, 176
3. It was also proved that in 1858, the city authorities caused a street, including the premises in question to be improved and worked; that in so doing, the defendant, as street superintendent, tore down a house upon the premises, with the consent of the owner, and the city paid him the value of it; and that ever since, the street, including the premises in question, had remained open, and had been used as a public highway, under the control of the city authorities, with the exception of certain acts of occupation by the plaintiff. The defendant claimed that the city had an interest in the premises, by virtue of the purchase from the former owner (the mortgagor) and was not served with notice of the foreclosure proceedings; that the plaintiff therefore was not entitled to assert possession of the premises, to the exclusion of the city, at the time of the alleged trespass. *Held* that if the city was not served with notice, the only consequence was that, as to it, the mortgage was unenforced, and the plaintiff was to be regarded as a mortgagee in possession. That his mortgage being past due, and paramount to the rights of the city, was sufficient to maintain his possession, as against the defendant. *ib*
4. Section 156 of chapter 143 of the laws of 1861, (being an act in relation to the city of Rochester) which directs that "Whenever any street, alley or lane shall have been open to

and used as such by the public, for the period of five years, the same shall thereby become a street, alley or lane for all purposes, and the said common council shall have the same authority and jurisdiction over, and right and interest in, the same, as they have by law over the streets, alleys and lanes laid out by it," was not intended to have a retro-active effect, so as to divest parties of existing rights, or to justify trespasses committed before it was passed. *ib*

5. Upon an application for the confirmation of the report of commissioners in the matter of the extension of a street in the city of New York, the question of the necessity or propriety of the improvement is not before the court, the consideration of that subject having been conferred by law upon the discretion of the common council, who pass upon it before the application to the court for the appointment of commissioners. *Matter of the Extension of Church street,* 455

6. In respect to the area of assessments for benefit for a street improvement, a wide discretion has been conferred by law upon the commissioners. They are authorized to extend their assessments to any lands they deem benefited, and appear to be vested with the sole discretion, in this respect. The statute takes the subject out of any review by the courts. The question is practically one of fact, and not of law. *ib*

7. The city parks and markets have the same value as property, as other lands, and it is but just that they should bear a *pro rata* assessment for public improvements. *ib*

8. Where a board of commissioners of assessments, in the matter of a street extension, was regularly organized, all appearing and taking the oath of office, and one of the number, with the others, agreed upon future meetings on a fixed day of the week, and met with the others, on several occasions, and transacted some business; was notified in writing of several meetings; and being notified orally, made partial promises to attend particular meetings; did not resign, or notify his associates that he would not act in the matter; and

they were not aware that he objected to act or confer with them (unless it was to be inferred from his neglect to attend their meetings) until his final refusal to sign the report; *Held*, that a report signed by a majority of the commissioners was to be deemed the act of the whole. *ib*

See CERTIORARI.
DEDICATION.
MUNICIPAL CORPORATIONS.

SUMMONS.

See PRACTICE, 2, 9.

T

TOWN.

1. An action will not lie against a town, to recover a claim arising upon contract. *Bell v. The Town of Keosau,* 506
2. Parties who contract to render services for either town or county do it with a knowledge that their remedy, to procure payment, is through the action of the board of supervisors. Where that body neglect or refuse to discharge a duty fairly imposed by law, performance will be compelled by mandamus. *ib*

TRADE MARKS.

1. A manufacturer has a right to put or stamp his own name on the articles manufactured by him, and on the bands, wrappers or covers, in which they are put up; and any injury which another manufacturer, of the same surname, may suffer thereby, must be viewed as an injury without a remedy. *Faber v. Faber,* 857
2. A manufacturer of lead pencils has no right to the exclusive use of a particular colored paper, or kind of paper, for covering or inclosing his pencils, by the gross in a book form, or any other particular form. *ib*
3. The plaintiffs were engaged in the business of manufacturing cement, or water lime, from quarries or beds lying near Akron, Erie county, de-

signed and sold as "Akron Cement," and "Akron Water Lime," the packages containing the same, when sold and offered for sale, having attached to each of them these words: "Newman's Akron Cement Co., Manufactured at Akron, N. Y. The Hydraulic Cement known as the Akron Water Lime." The defendants being engaged in manufacturing and selling a similar article from quarries or beds situated near Syracuse, Onondaga county, and knowing that water lime cement was manufactured and sold by the plaintiffs under the name of "Akron Water Lime," and "Akron Cement," called their own beds the "Onondaga Akron Cement and Water Lime," and after that, they sold the water lime and cement, prepared by them, with a label on each package, having these words upon it: "Alvord's Onondaga Akron Cement, or Water Lime, Manufactured at Syracuse, New York;" such water lime and cement being placed upon the market, and sold in the same places, where that manufactured by the plaintiffs was sold and used. *Held*, that the word "Akron," as used by the plaintiffs, was their trade-mark, by which they designated the article manufactured and sold by them; and that they were entitled to be protected in such use of it, by an injunction restraining the defendants from making use of the word "Akron" as their trade-mark. *Newman v. Alvord*, 588

4. *Held, also*, that the case was not one of such doubt as to require the plaintiffs' right to be first established at law. *ib*

5. *Held, further*, that to defeat the plaintiffs' right to appropriate the term "Akron," on the ground that it had previously been in common use, such a use of it must be shown as would extend to and include the defendants. That until that was done, the use made of it by the plaintiffs might well be exclusive of the defendants without being so as to the inhabitants of Akron. *ib*

TRUSTEES.

Of a village—See CONSTITUTIONAL LAW, 1.

V

VENDOR AND PURCHASER.

1. In an action to recover the value of goods sold and delivered by the plaintiffs to the defendants, one of the defenses was that the sale was by samples, represented and warranted fair and correct; that the goods being inferior to the samples, the defendants returned them, and the plaintiffs accepted and disposed of them, without notice to the defendants. The terms of the sale in respect to the warranty of quality were quite uncertain, from the contradictory character of the evidence; one of the defendants testifying that the plaintiffs guaranteed the goods, and the plaintiff asserting the contrary. *Held*, that while the jury might have been justified in finding that it was a sale by sample, there being no such decisive evidence to that effect as would authorize the judge to give it to them as a conceded fact, or as a deduction of law, he properly left it to them to determine what was the intention of the parties, in that respect. *Stone v. Browning*, 244

2. *Held, also*, that the jury having found that the defendants had no legal right to return the goods and rescind the sale, the latter were bound to pay the plaintiffs their commissions upon the resale for their account. *ib*

3. The plaintiffs, in their correspondence, asserted an absolute sale, and notified the defendants that they would treat the goods returned to them, as upon consignment from the defendants, and apply the proceeds upon their (the plaintiffs') "lien" for the price. *Held* that the word "lien" was not used in the technical sense, but was equivalent to "claim or demand" for the price; and was not inconsistent with an absolute or unconditional delivery so as to let in a defense under the statute of frauds. *ib*

4. *Held, further*, that the defendants were entitled to have the damages assessed at the market rates prevailing when the goods were returned, or the breach occurred; but that if the damages would then have been much larger in amount, so that they

in fact sustained no injury, by such delay, nor by a sale upon credit, they had no right to complain. *ib*

5. A liquor merchant in Syracuse, in former good standing with the plaintiffs' firm in New York, gave a verbal order to the plaintiffs for a bill of goods on credit, which were sent to him by railroad and left in a storehouse at Syracuse. The merchant was in fact insolvent, and became fully aware of it before he paid the freight and took the goods into his custody; *Held*, that the judge properly instructed the jury that it would be a fraud upon the plaintiffs, sufficient to avoid the sale, if they believed, upon the evidence, that the purchaser received the goods with a preconceived design not to pay for them, although he had no such design when he gave the order. *Pike v. Wisting*, 814

6. *Held*, also, that the receipt by mail of the bill of goods by the purchaser, containing the terms of sale, would not take the contract out of the statute of frauds, but either party might repudiate it at any time before the actual receipt and acceptance of the goods by the purchaser. *ib*

7. The refusal of purchasers either to pay the money, give security, or do any other act in fulfillment of the contract, gives to the vendors the right to sell the property on the purchasers' account, and to hold them responsible for a deficit in the price. *Lewis v. Greider*, 606

8. It is not necessary, in such a case, for the vendors to give the vendees notice either of the time or place of sale. General notice of their intention to sell is sufficient. *ib*

9. The law, in such a case, constitutes the vendor in possession of the goods the agent of the vendee, for the purpose of such sale. As such agent, he must act in good faith, and take proper measures to secure as fair and favorable a sale as possible. *ib*

10. Vendors are not restricted, under such circumstances, as respects the place of sale, to the place of delivery of the property named in the contract, nor to a time necessary for

reasonable notice, after the right to sell accrues; but if the property cannot readily be sold at the place of delivery fixed by the contract, or a better and more advantageous sale can be effected elsewhere, it is the duty of the vendor to go where he can get the best price and readiest sale, not out of the usual course and channels of trade in marketing such property. Such sale should be within a reasonable time. *ib*

11. The presumption is that a referee did not overlook the terms of a memorandum of sale, or fail to consider it as it stood at the time of the trial in weighing the evidence upon a disputed question of fact. It is for the party complaining of the report to show clearly that such a mistake has occurred, before he can ask the court to act upon it. *ib*

VERDICT.

A verdict and judgment, in form, as if the action were on the case, are wholly unwarranted in an action for the claim and delivery of personal property. *Wheeler v. Allen*, 460

See CRIMINAL LAW, 7, 8.
PRACTICE, 8.

VILLAGE OF EDGEWATER.

See CONSTITUTIONAL LAW, 1.

W

WARRANT.

See CRIMINAL LAW, 1, 2, 3, 4.
LANDLORD AND TENANT, 2, 3, 4, 6.

WHARF AND WHARFAGE.

1. In an action by the plaintiff, the owner of a wharf or dock at the foot of Sedgwick street, Brooklyn, to recover a sum claimed to be due from the defendant, for wharfage, the defendant attempted to show the wharf or pier to be within the county of New York, inferentially, from the following statutes and facts, viz: The county of Kings is bounded

northerly by the county of New York; the county of New York contains all the land under water to low water mark, on Long Island; the statute, (*Laws of 1886, ch. 484, § 2*), makes the bulkhead line to be located in pursuance of its provisions, the permanent water line of the city of Brooklyn, and prohibits the extension of any bulkhead into the East river beyond such line. In 1857, the legislature established a bulkhead line, or line of solid filling, and prohibited the filling in with solid material in the waters of the port beyond such bulkhead line. The evidence did not show where the line of low water mark was, or the bulkhead line established by law. There was a bulkhead at the foot of Sedgwick street, and the wharf or pier in question extended 450 feet into the water beyond; but it was not shown that such bulkhead extended to the line established by law. *Held*, that it could not be assumed that the law prohibiting the erection of a wharf or pier of solid material in the water outside of a certain line had been violated. That there was no necessary sequence, from the statutes referred to, or the evidence in the case, that the premises were not in the city of Brooklyn. *Kelsey v. Murray*, 281

2. *Held*, also, that the lessees of the plaintiff having been dispossessed of the premises, under summary proceedings instituted by the plaintiff, before the city judge of Brooklyn, for non-payment of rent, and the judgment of dispossession having been affirmed by the Supreme Court, on *certiorari*, such judgment and affirmance were a conclusive bar to any claim to the wharfage by the lessees of the plaintiff. *ib*

WILL.

1. Construction of.

1. A testator devised to his wife and daughter, each, the equal one half part of his estate, real and personal, share and share alike, subject to these restrictions, viz. that each of the devisees was vested with a power of testamentary disposition, unaffected by any trust or limitation; but in case of the death, *intestate* and

without issue, of either devisee, whatever might remain of the said property, was devised to the survivor. *Held* that each devisee might, during her lifetime, dispose of the entire fee of the estate devised to her, for her own benefit; and that the devisees having united in a conveyance to a purchaser, of the premises, with covenant of warranty, such conveyance passed all the title of the grantors, either vested or contingent; that such title was good, and the purchaser in equity was bound to accept it. *Freeborn v. Wagner*, 43

2. *Held*, also, that any execution of the power of testamentary disposition, made after the execution of the said conveyance could have no manner of effect upon the estate thereby conveyed. *ib*
3. A will contained substantially the following provisions: "After all my lawful debts are paid and discharged, I give and bequeath unto my executor hereinafter appointed, all my estate, real and personal, &c. *in trust* for the following uses and purposes, viz: I direct my executor to pay and apply the whole net income of my estate to the use and support of my mother and wife during the life of my mother, and to permit my wife and mother to use and occupy my farm as their home during the life of my mother. On the death of my mother, I order and direct my executor to pay" certain legacies amounting to \$5,800. "Fifth. I do give, devise and bequeath all the rest, residue and remainder of my said estate to my wife, and to her heirs and assigns forever, which is to be accepted and received in lieu of all dower and right of dower, and I do hereby authorize and empower my said executor to sell and convey my real estate, at any time after the death of my said mother, and to pay over the proceeds thereof to my said wife." *Held*, 1. That the trust created by the will did not comprehend the payment of the testator's debts. 2. That when the purpose for which the trust was created ceased, by the death of the testator's mother, and the payment of the legacies, the estate of the trustee ceased also. 3. That the power given by the fifth

clause of the will, to the executor to sell, unaccompanied by any trust, except to pay over the proceeds to the wife, could not be upheld upon any application of the principle of equitable conversion; that doctrine never being applied or enforced to defeat, but always to uphold and preserve, estates. 4. That such power was a general power in trust, and was repugnant to the direct and absolute devise to the wife. And that she having remained in possession after the death of the testator; and being in actual possession, claiming under the devise to her, when a conveyance of the premises was made by the executor, in assumed execution of such power; and constantly asserting her title as owner in fee; the principle of the general rule that a power shall not be exercised in derogation of a prior grant by the appointor, applied; notwithstanding the devise and power took effect the same instant. 5. That the power to sell, in the fifth clause, had no connection with the devise in the first clause; the latter being a trust, while the former required the proceeds to be paid to the wife, which would be in direct contravention of the trust. 6. That the object of the testator was: (1.) To have his debts immediately paid out of his personality, and his farm kept for the use of his mother and wife. (2.) To have the objects of the trust fulfilled; after which, (3.) To give the residue of the property to his wife. And that the power of sale could not be allowed to operate to defeat this intention of the testator. 7. That the object of the power was not a lawful one. *Quin v. Skinner*, 128

4. Accordingly *held* that a conveyance of a portion of the real estate of the testator, executed by the executor and trustee, to a third person, did not operate to defeat the estate of the wife in the premises. *ib*

2. Execution.

5. To constitute a valid publication of a will or codicil, the testator must, in the presence of two witnesses, declare the instrument to be his last will and testament, or a codicil thereto. If the proof fails to establish such a declaration, to one of the subscribing witnesses, the in-

strument should not be admitted to probate. *Abbey v. Christy*, 276

6. Where one of the attesting witnesses testified that on entering the testator's room, the latter, taking a paper out of his portfolio, desired the witness to read it, which he did, silently; after which the testator requested him to witness his signature; in answer to a question put by the witness, whether he had read the paper produced, the testator said he had heard it read; and being asked if it was all right, he replied "I think so;" and the other witness testified that when they entered the room the testator remarked that he wanted them to "witness his signature;" that they then put their names to the paper as witnesses; but that "nothing was said whatever, regarding what the paper was, or any thing about it," that the witness never read it, and did not know what it was; *Held* that this was not a sufficient publication. *ib*

7. Of the effect of an attestation clause, as evidence of the due execution of a will. *ib*

WITNESS.

1. A party is not permitted to assert, or to present evidence to show, that one state of facts is true, and afterwards to assert or prove to the court that his prior evidence was untrue, or not to be relied on. But where a witness has given evidence against the side for the support of which he has been called, and the court can perceive good grounds for apprehending that the witness has testified under a mistake of the facts, or intentionally falsely, and there is no bad faith on the part of the party producing the witness, he is allowed to give evidence explaining, or even contradicting, his own witness. *The People v. Sheehan*, 217

2. A judge, at the trial, may permit counsel to ask a party examined as a witness on his cross-examination, if he has not sworn falsely in a particular suit, or on some specified occasion; for that would be an act of himself which, if he admitted, he might possibly explain. But a judge has not the discretion to permit the

other party to affect the credit of the witness, as such, by proof by him, on his cross-examination, that third persons have accused him of swearing falsely; that being mere hearsay evidence, and not proof of acts or declarations of the witness for which he is personally responsible. *Hanna v. McKellip*, 842

3. Where a witness' character for truth and veracity is attacked by asking him, on cross-examination whether third persons have not accused him of swearing falsely, evidence to show that his general character for truth and integrity is, and always has been good, is not admissible. *ib*
4. The fact that the witness has not sued such third persons for slander will not make the specific slanderous accusations made by them admissible to affect his credit. *ib*
5. The positive testimony of an unimpeached, uncontradicted, witness,

cannot be discredited or disregarded, arbitrarily or capriciously, by court or jury. *Seibert v. The Erie Railway Company*, 588

6. Although it belongs to a jury, in considering the weight of evidence, to pass upon the credit due to the respective witnesses, this does not imply that they may, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted, witness, who testifies fairly, and gives clear, rational, consistent and relevant testimony. *ib*
7. For judicial purposes, all witnesses stand upon a par, and must be believed in their testimony, unless discredited by the inconsistency, incredibility, or improbabilities, of their statements, on cross-examination, or otherwise contradicted by other witnesses, or impeached in respect to their general character for integrity or truth. *ib*

END OF VOLUME FORTY-NINE.

V. Rev. R. T. O.



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